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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered on June 10, 1976.

Opinions Below

The opinions rendered in this action, in reverse chronological order, are:

Opinion of the Court of Appeals of the State of New York dated June 10, 1976 (Appendix, pp. 1a to 2a), which is reported at 40 N.Y.2d. 905 (1976);

Opinion on Remittitur of the Appellate Division of the Supreme Court of the State of New York dated June 23, 1975 (Appendix, pp. 3a to 4a),

which is reported at 48 App. Div.2d 895, 372 N.Y.S. 2d 986 (2d Dep't 1975);

Opinion of the Court of Appeals of the State of New York dated November 27, 1974 (Appendix, pp. 5a to 6a), which is reported at 35 N.Y.2d 845, 363 N.Y.S.2d 85, 321 N.E.2d 877 (1974);

Opinion of the Appellate Division of the Supreme Court of the State of New York (including dissenting opinion), dated April 15, 1974 (Appendix, pp. 7a to 18a), which is reported at 44 App.Div.2d 694 354 N.Y.S.2d 988 (2d Dep't 1974);

Opinions of the Supreme Court of the State of New York, Castaldi, J., dated June 19, 1973, June 13, 1973, June 5, 1973 and April 3, 1973 (Appendix, pp. 19a to 51a), which are unreported;

Opinion of the Court of Appeals of the State of New York dated June 9, 1971 (Appendix, pp. 52a to 58a), which is reported at 28 N.Y.2d 465, 322 N.Y.S. 2d 708, 271 N.E.2d 546 (1971);

Opinion of the Appellate Division of the Supreme Court of the State of New York dated June 22, 1970 (Appendix, pp. 59a to 60a), which is unreported;

Opinions of the Supreme Court of the State of New York, Groat, J., dated June 24, 1968 and June 13, 1968 (Appendix, pp. 61a to 65a), which are unreported.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was rendered and entered on June 10, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and here denial of rights secured by the Constitution of the United States.

Questions Presented

1. Does it meet the requirements of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States to base a condemnation award on the condemnee's costs in acquiring and improving the condemned property rather than on market value?

2. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to rule out of consideration on the condemnee's case the standard methods of valuation by capitalization of estimated future income and comparable sales, including sales of properties that the condemnor has designated as comparable sales?

3. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to rule out of consideration all of the facts and factors that any buyer and seller of the property would have considered?

4. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to reach a valuation and award for the condemned property in an amount far below values established by sales of properties conclusively found to be inferior?

5. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to give no consideration to the best use of the property and disregard the conclusively determined best use?

Constitutional Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

This case involves what is undoubtedly the largest property in one ownership which has ever been condemned within a major American city. The 529-acre property, which is now part of the United States National Park system,* is known as Breezy Point, and is situated on the Atlantic Ocean, at the end of the Rockaway Peninsula in Queens County, New York City.

The property was condemned by the City of New York in November 1963 and August 1964 for the purpose of turning it into a public park, because it was regarded as more important in the public interest to so employ the property than to have it developed, as it was being developed, as a private project for much needed private housing.

At the time of the decision to condemn the property, the Mayor of the City described the property as follows:

> "Breezy Point, commanding one of the most magnificent vistas available anywhere within the limits of New York City, and containing the only major undeveloped beach-front expanse within the limits of New York City, is a precious asset incapable of duplication."

Similarly, in determining to condemn the property, the City Planning Commission of the City of New York stated that "Breezy Point is the last remaining oceanfront in New York and one of the world's great beaches."

The property has a very extensive beach front on the ocean, where clean water makes for excellent bathing, a substantial frontage on Jamaica Bay, excellent for boating, and commands "magnificent vistas" both out to sea and to the New York skyline.

* Gateway National Recreation Area, 16 U.S.C.A. §§ 460cc to 460cc-4.

Because of its size, environmental protection of water on three sides and built-in recreational facilities, it was ideal for the development of a self-contained apartment house community, for which it was master-planned and under development by petitioner (hereafter "claimant") for a period of three and a half years prior to condemnation.

Needless to say, there was nothing like it in or about New York City—the trial court found that none of the sales properties offered by either side for comparative value "measure up in value to Breezy Point"—and the bitter irony is that all sales of properties capable of comparison as value indicators were eventually held not to be so usable as a matter of law because they did not possess Breezy Point's outstanding valuable qualities of size, location and amenities, with the end result that the condemnation award was only a fraction of market value established by the sales of vastly inferior properties.

The development of the property by claimant, long underway and far advanced at the time of condemnation, included (1) the master planning of an entire apartment house community on a section of 122 acres of upland and 56 acres of readily fillable underwater land, known as the Initial Project Area (with development of the remaining acreage to follow); (2) a detailed site plan approved by the City showing the location, height, and floor area of each building to be built and specifications approved by the City for each building type; (3) agreement with the City on a street system, drainage system, and school facilities for the community and installation by the City itself of the principal water mains to service the area; (4) agreement by the City to increase the zoning designation of the property and to sell to claimant additional underwater land for building; (5) advanced construction of five 7-story apartment build-

ings, two 15-story apartment buildings and one town house apartment building; (6) virtual completion of a shopping center with leases signed for a major supermarket and five other stores; (7) completion of a new beach club and reconstruction of an existing beach club, with both in successful operation. A piece of the property had been purchased for constructing a church. Arrangements had been made with a bus company to extend bus service to the property. A rental building had been completed, and rental of apartments was ready to start.

As rental was about to start, the City condemned almost all of the property, leaving claimant only a landlocked 20-acre portion on which most of the construction had taken place. This remainder, separated from the water and the community development of which it was an integral part—left to be surrounded instead by parking lots and other facilities for a public park and beach—was thus decimated in value for its purpose of a private development with a private beach. To save itself from consequential damages to the remainder by reason of the condemnation and because the whole property, except for the buildings, was desired for the condemnation use, the City later contracted with claimant to purchase the buildings at cost and take the remainder at a price to be fixed in accordance with the footage award in the condemnation proceedings.*

At the first trial, both sides valued the property by the standard method of using sales of other properties. The City, contending that the highest and best use of the property was for one and two family houses, rather than for the type of development that was in progress and for which the

* The reason that the remainder was not condemned became apparent at trial when the City presented its theory that the condemned property should be valued as wholly undeveloped and as if there had been no development at all. As will be seen, the Court of Appeals accepted this proposition as the basis for its determination.

property was zoned, used 19 sales, mostly of sites which had been subsequently developed with one and two family houses, but included four sales of properties subsequently used for apartment house building in Belle Harbor, an area on the Rockaway Peninsula adjacent to Breezy Point. Claimant, contending that the highest and best use of the property was for the type of apartment house development which was underway, used 51 sales, all of properties that were subsequently developed with apartment houses. Included in these sales were the four apartment house properties in Belle Harbor used by the City, which claimant's experts considered the most pertinent sales because of their proximity to Breezy Point.

Claimant also utilized the other standard method of valuation, capitalization of estimated future income, based on estimating the income that would have been received from the development and the expenses that would have been incurred. As the development had been so thoroughly planned and was so far advanced in building, the expenses were readily calculated and indeed largely stipulated by the parties. One City expert even said that operating expenses would be less than estimated. The only element in the calculations that was questioned was the rents that could be expected, an item well within the competence and experience of expert evaluation and judicial determination.

The trial court, after a six weeks' trial, found that the highest and best use of the property was for an apartment house development, and, on the basis of both sales and capitalization, made an award of $39,775,208, amounting to an average of about $2.65 per square foot for the approximately 15,000,000 square feet of upland, including in that award the value of approximately 8,000,000 square feet of foreshore and underwater land condemned, which were of special value because shallow and readily available for filling and building. The award was less than half of the sales prices of the properties in Belle Harbor which both sides had considered comparable.

The Appellate Division, a court empowered in New York to review the facts as well as the law, and whose affirmance of the factual findings of a trial court is conclusive on the facts, unanimously affirmed the award.

The Court of Appeals, the state's highest appellate court, with jurisdiction only over legal questions, reversed and remanded the case for a new trial. It held that capitalization evidence could not be considered in a case, as it described this one, of land "completely bare" with plans for projected development, but on which "no part of the work had been contracted for or started" and "on which no work had even been begun."

The only way to account for this premise of decision, ignoring the enormous amount of work done and the advanced state of the development, is that the court embraced the stratagem of the City in gerrymandering out of the formal condemnation the integral part of the property on which construction had commenced, but still taking it by purchase on the basis of the condemnation award.*

The Court of Appeals also held that the sales submitted—including those in the nearby area of Belle Harbor that had been submitted as comparables by both sides—should not have been considered, since they were "in long established, densely populated residential centers," while the subject property was in an undeveloped area, and was "vastly larger" than the comparables. A City expert had acknowledged that the larger size was an advantage both for community purposes and economy of operation.

The court concluded by saying that "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects," and that "some consideration" should be given to two connected transactions, by which claimant contracted to purchase the whole of Breezy Point three and a half years before condemnation and thereafter assigned to a cooperative of bungalow owners at the property the right on closing to buy a section on which most of the bungalows were located.

* Even looking at the condemned acreage with blinders on as to adjacent integral development, the court's statement that no work had been done was incorrect. There was, in fact, substantial work completed in the condemned area, including most of the sewers and water mains, the sewage pumping station, the rental building, and both beach clubs.

The sellers were a family of elderly sisters and a brother who had no capacity or inclination to develop the property and were overwhelmed in attempting to deal with 3,000 owners of bungalows on leased land. The family wanted to be rid of the burden and get for the property immediate cash sufficient to support themselves in their last years. They insisted upon including in their contract of sale with claimant a specific recital of their refusal to make any representations as to the rights of the bungalow owners—who had "always caused trouble" and asserted contractual and statutory rights to the land on which they had built—or as to the right of the purchaser to remove them in order to be able to develop the property. Thus the contract of sale, and of course the price, were made in reference to the uncertainty of development because of the tenant situation.

Immediately upon execution of the contract, the tenants put up such effective opposition in all quarters to the planned development that it appeared unlikely that claimant could develop the property at all for apartment house use unless it made peace with the tenants. This it was forced to do by assigning to their cooperative the right to buy the section they wanted to preserve their bungalow use and loaning them the money to do so, although claimant desired and had intended to use the whole property in its development. The trial court described the conditions under which the sale to the tenants was made as "riotous",

coming after "a series of incidents that were almost as if a gun was held to [claimant's] head."

Claimant's contract price was about 55¢ per sq. ft. The price to the tenants for their own bungalow use—dictated by them and to be taken on an "or else" basis of resort to "weapons" which they were "sure you know we have available to us"—was about 68¢ per sq. ft. The prices were far lower than the minimal prices of apartment house land or even one or two-family house land in New York City. The trial court had said that they were less than Breezy Point would be worth for pitching tents.

Upon the retrial, capitalization was, of course, not employed, although both City appraisers acknowledged that any prospective purchaser of the property would have employed this method in making his evaluation of the property.

In similar deference to the Court of Appeals' mandate, neither party employed sales in developed areas.* Claimant submitted 17 sales of undeveloped land, nearly all in marginal areas of New York City, because only such areas existed that were not built up. None of the properties had the advantages of Breezy Point. The City submitted 37 sales, also in marginal, undeveloped areas, almost all of which were ultimately used for one or two-family houses, which the City experts still contended was the best use of the property, although not suggesting why the property was not equally attractive for apartment living. There was one property offered by both sides—a large undeveloped tract directly across Jamaica Bay from Breezy Point, which ultimately became the site of a large apartment house development.

The trial court (a different judge) again found that the highest and best use of the property was for an apartment house community, and made an award of $31,000,000

* One of the City experts admitted that he was thus prevented from using the sales he considered to be the most pertinent and had used on the first trial—the sales in the adjacent community of Belle Harbor.

(amounting to an average of about $2.00 per square foot for the upland, assuming that all value for the underwater land was attributed to the upland).*

The court, of course, recognized that there were no "comparables" in the sense of "similar" or with like attributes and value of the condemned land. The court also realized the "vexing circumstances" of not being able to consider the likely income from development of the property—a factor that the experts for both sides agreed would be considered by any prospective purchaser**— and being subject to such strict limitations as had been placed on the use of sales of other properties. On this account the court felt obliged to rule out of consideration all but two of claimant's proffered sales because they were not very large tracts.

To the urging of the City that the court was thus driven to adopting claimant's costs as the award, the court responded with the words of this Court, that "it is the property and not the cost of it that is safeguarded by state and

* The valuation consisted of $2.65 per square foot for the 5,330,000 square feet of upland in the Initial Project Area, $.90 for the 2,400,000 square feet of underwater land in that area, $1.35 for the 9,000,000 square feet of upland at the rest of the property (the "Tip"), and $.45 for the 5,500,000 square feet of underwater land in that area. The two sections were alike in all respects and were of like value. The lower value was assigned to the Tip primarily because under the development plan building there would be delayed pending completion of the Initial Project Area.

** One City appraiser said in his appraisal report that any prospective purchaser or investor would necessarily utilize the capitalization approach, and estimate the income that would be derived from the property and the expenses necessary to produce that income:

> "In connection therewith, the prudent investor and/or builder would examine sales to ascertain whether an asking price for land fell within the zone of reasonableness. Before he would invest however, he would determine the most profitable type of improvement to add to the land. The cost to erect such building, added to the cost of land, would amount to his total investment. He would then examine rent potential and operating expenses to arrive at a realistic forecast of net operating income."

federal constitutions'' (*Olson* v. *United States,* 292 U.S. 246, 255 (1934)) and that ''original cost'' or ''purchase price'' and ''value'' are not synonymous (*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396 (1949)).

While perplexed, the court did know at least that in two sales of the one large property offered by both parties, in one sale of another large property offered by claimant (Birchwood), and other sales of large properties offered by the City—all of which ''did not measure up in value to Breezy Point''—it had minimum values to go on. It also had the guidance of the Court of Appeals in a 1969 case approving the determination of a trial court based on its consideration of ''many sales with little comparability'' that gave ''at least a glimmering of the path to the market place.''* Similarly, the trial court in the present case was able to find in the City's sales ''at least a vestige of value as related to Breezy Point.''

The court gave full consideration to the transactions by which claimant and the bungalow owners' cooperative (the ''Cooperative'') acquired their tracts at Breezy Point, and found, as its stated factual conclusions, that claimant's original contract to purchase Breezy Point was ''something less than a normal market sale'' that ''doesn't reflect the true or actual value of the property,'' and that the

* In that case, *In re City of New York* (*Boston-Secor Houses-Rusciano*), N.Y.L.J., January 21, 1965, p. 16, col. 2 (Sup. Ct. Bronx County), *rev'd.* 23 App. Div. 2d 658 (1st Dep't 1967), *rev'd,* 25 N.Y.2d 430 (1969), the trial court found that "by reason of differences in size, location, zoning, neighborhood or time of sale," none of the sales submitted "could be deemed comparable to the subject property," but also found, in rejecting the claimant's costs as a basis of value, that these sales still could be utilized in determining value, stating, in a decision that was ultimately approved by the Court of Appeals:

> "Nevertheless the Court has taken into consideration all of the sales submitted by both sides with the view that although no one sale submitted is wholly comparable, many sales with little comparability can add up to giving the viewer at least a glimmering of the path to the market place."

assignment by claimant to the Cooperative of the right to purchase its portion of the property was ''indeed a forced sale,'' in which 'claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms.'' The court, nevertheless, explicitly considered these transactions in making its award. The lowness of the award made can be explained only by the fact that the court gave very substantial weight to those transactions.

The Appellate Division affirmed the award, this time in a 3-2 decision, ''on the opinion of the trial court.'' The Appellate Division—which, as noted, is the only New York appellate court empowered to review the facts—thus conclusively affirmed the trial court's factual findings, including the findings with respect to best use and the two transactions involving the simultaneous acquisition by claimant and the Cooperative of the Breezy Point property from its original owner, and that the sales submitted by both sides ''did not measure up in value'' to Breezy Point.

The dissent in the Appellate Division accused the trial court of ignoring the guidelines laid down by the Court of Appeals, in that it had ''excluded from its consideration'' the sales to claimant and to the Cooperative (which the trial court explicitly stated it had considered)* and criticized the trial court for giving any consideration to *any* of the sales offered by either party in that they were not ''truly comparable.'' It differed with the trial court on the factual finding of best use, without reference to all the trial court said as to the bases for its finding and without intimating what the dissenters may have thought the best use to be. The dissent also said, ignoring the three and a half years of planning and building that had accomplished so much in development of the property, that the use was ''no more than a hypothetical hope in the mind of the claimant.'' The dissent concluded that, as in ''a somewhat

* The dissent did not treat at all the factual findings of the trial court with respect to those sales.

similar situation" (*Matter of City of New York (Chestnut Properties)*, 39 App. Div. 2d 573 (2d Dep't 1972), *aff'd*, 34 N.Y. 2d 800 (1974)), the "proper method of valuation" was to add to the "recent actual sales price" the "costs of developmental enhancement." It is not apparent, as will be further noted, just what "sales price" the opinion was referring to, but it was referring back to the time years before of the simultaneous acquisitions by claimant and the Cooperative of the whole of Breezy Point, and was referring to acquisition cost.*

The Court of Appeals again reversed, in a one-paragraph opinion, agreeing with the dissent that one sale the trial court placed emphasis on (Birchwood) should not have been considered, but saying nothing about other sales. The court added that "little, if any weight was given to the prior sales of this property," *i.e.*, the sales to claimant and the Cooperative, and concluded that "the proper test for vacant land, unexploited or only partially exploited is that found in *Matter of City of New York (Chestnut Props. Co.)* (39 A.D. 2d 573, *aff'd.* 34 N.Y. 2d 800)." The case was remitted to the Appellate Division for a reappraisal "within the legal framework set forth in the dissent."

On remand, the Appellate Division, obviously believing that the Court of Appeals had dictated the amount of the award, although it had no such power and had said "We cannot go so far as to dictate the amount of the award and thus express no view on the actual amounts arrived at in the dissent," simply stated in a brief memorandum opinion:

> "In accordance with the memorandum of the Court of Appeals, we have reappraised this case 'within the legal framework set forth in the dissent.'

* In the *Chestnut* case, unlike the present case, the acquisition was an ordinary market transaction with no unusual features or circumstances, both sides agreed that there were no comparable sales, and there was no question that the property when acquired was readily available for its highest and best use of apartment building, as the seller had warranted.

> In so doing, we have arrived at the same result, and for the same reasons, expressed in the dissent."

The result was the award suggested in the dissenting opinion of $15,000,000—$16,000,000 less than the award it had previously affirmed, and about $25,000,000 less than the award it had initially unanimously affirmed. The $15,000,000 award was affirmed in the Court of Appeals in a brief memorandum opinion. (Appendix, pp. 1a-2a).*

The award was far below the prices in sales of properties that were conclusively found by the finders of fact not to "measure up in value to Breezy Point," and to indicate only a "vestige of value as compared to Breezy Point." The award was far less, for example, than the sales prices of the one large property submitted for comparable valuation by both sides—a property that was palpably inferior to Breezy Point in every way.**

* The $15,000,000 figure is a mystery. The dissent uses a variety of figures to reach an amount "representing the costs of developmental enhancement" (the figuring is incomprehensible) which come to $4,300,000, the amount to be added to the "actual sales price," making a total of $15,000,000. Deducting $4,300,000 from $15,000,000 leaves $10,700,000 for the condemned land, or about $.70 per square foot for 15,000,000 feet of upland, with nothing for the 8,000,000 square feet of underwater land condemned. The $10,700,000 figure cannot be identified with any "sales price." Perhaps the City is correct, however, in what it has since suggested, that the figure was taken from the price paid by the Cooperative, which was about $.68 per square foot. But regardless of just how the figure was derived it represents acquisition cost, and a price related only to a bungalow use, and without adding anything for appreciation over the next three years, which the City appraisers said would be 15% for land without any development going on.

** The City submitted a sale at $1.37 per square foot of this property, which was in a marginal area which the City itself described as being marked by "air pollution . . . poor subsoil conditions (that would have made the site development costs six times those at Breezy Point), foul odors, underground fires, and rats," and which had no beach or bay frontage or any amenities. The sale was at a time when, because of its zoning, the land was not available, as was the subject property. for the building of high-rise apartments. Claimant submitted a subsequent sale of this property, after its zoning was changed to make it available, like the subject property, for high-rise apartments, at $2.10 per sq. ft.—three times the land award made in this case.

The award represents a destruction of the investment in claimant's securities. On the basis of the award, the holders of claimant's common stock, which was issued to the public at $13.50 per share in 1961, and was selling at $23.50 in April 1962, just prior to the first rumors of condemnation, will not receive a penny. Similarly, the holders of claimant's junior preferred stock, representing a cash investment of $5,000,000 (in 1961 money), with accrued and unpaid interest of over $5,000,000 over 15 years, will not receive a penny.

In sum, for the first time that we know of in a condemnation proceeding, all market data has been excluded from consideration, together with all proof and determinations of best use, all evidence of the income to be expected (on extensive proof) from a property advanced in development, and all evidence of sales that at least establish market values below which no one attempting to ascertain the fair market value of the condemned property could value it, with a resulting award based on the owner's costs rather than on market value.

How the Constitutional Questions Were Raised and Decided Below

The constitutional issues sought to be reviewed were first raised in a motion for reargument made to the Court of Appeals after the first of that court's three decisions, in which it held that capitalization of estimated future income could not be used, and that the sales of other properties submitted by the parties could not be used. Prior to that decision, it had not been suggested by any court or party that no market data and none of the standard methods of valuation could be utilized, and both parties had utilized a substantial number of sales, so there was no occasion to raise constitutional questions.

In the motion for reargument, it was submitted that the Court of Appeals' decision "is unjust and unconstitutional

in result in denying claimant all the usual processes of proof of value" and "forecloses the possibility of proof of fair value and deprives Claimant of its property without due process or just compensation." The Court of Appeals denied the motion for reargument without opinion.

The constitutional issues were raised again before the trial court at the second trial, particularly in answer to the court's inquiry as to how it could determine value in the face of the Court of Appeals' ruling barring capitalization and so substantially circumscribing the use of sales. The trial court found, however, that it was able to meet its constitutional obligation and make a valuation on the basis of sales of other properties although they "did not measure up in value to Breezy Point." The award was certainly minimal as it was less than the prices in those sales.

The constitutional issues were then presented to the Appellate Division and Court of Appeals, with claimant contending that the position then assumed by the City—that sales like capitalization should not be considered and that claimant should be relegated to its costs—was constitutionally intolerable.

The Appellate Division affirmed the trial court's award on the basis of the trial court's opinion, and thus saved the award from constitutional attack by a minimum comport with constitutionality. The Court of Appeals, however, in complete disregard of the affirmed and hence conclusive factual findings on best use and value and with respect to the transactions by which claimant and the Cooperative purchased Breezy Point, pronounced as its rule of law that sales, like capitalization, could not be considered and that valuation should be based on costs, and remitted the case to the Appellate Division to make an award accordingly.

On motion for reargument to the Court of Appeals, claimant reasserted its position that any award "based solely on Claimant's land and development costs" and rulings "prohibiting the use of the ordinary, recognized methods of valuation would be plainly violative of the constitu-

tion." The Court of Appeals denied the motion for reargument without opinion.

On the remand to the Appellate Division directed by the Court of Appeals, the constitutional issues were again raised in the briefing and argument, but that court, in a brief memorandum of obeisance to the Court of Appeals, merely adopted the prior dissenting opinion in the Appellate Division and the award there suggested.

A third and last possible appeal to the Court of Appeals, exhausting the pursuit of claimant's rights in the state court system, was based entirely, with one minor exception, on federal constitutional questions now presented to this Court.

Reasons For Granting Writ

The highest court of New York State has pronounced and applied a rule of law in this condemnation case that is contrary to principles and rules of constitutional law established and reiterated by this Court. Not only has a confiscation of at least $16,000,000 in value of claimant's property thus resulted, but if the decision were allowed to stand it would be seized upon by condemning authorities across the land as a license similarly to take exceptional private property for public use and avoid the payment of just compensation. The most valuable of condemned properties, because of their distinctive valuable attributes, would be removed from constitutional protections, and it would become the law in such cases that only a condemnee's costs need be reimbursed rather than compensation for the property paid. All consideration of market value indicators would be eliminated in a single regard for the condemnee's costs. This Court has repeatedly spoken to the constitutional impermissibility of such a mode of reaching a condemnation award. It is of first importance in the busy area of condemnation that constitutional standards be maintained and that, in accord with the vigilance this Court has exercised to that end, the Court set condemning authorities

and courts of the country straight on the basics involved in this case, so that the decision sought to be reviewed does not become a pattern for subverting constitutional guarantees.

The decision of the New York Court of Appeals violates the constitutional prohibition against the taking of property without just compensation in basing the award on the landowner's costs, rather than market value, and ruling out of consideration the best use of the property, all market data, the standard methods of valuation by capitalization of expected income and market sales of other properties, and all the factors that a prospective purchaser of the property would consider.

The Fifth Amendment to the Constitution of the United States provides,

> ". . . . nor shall private property be taken for public use, without just compensation."

Until the present case, "just compensation" has always been defined to require that a landowner be paid the fair market value of condemned property. Here this requirement has been dispensed with, and it has been held sufficient to award reimbursement of his costs, without regard to market data or market value or the processes by which market value can and must be determined.

At the outset, we note that this Court has emphasized the importance of its function of reviewing the determinations of state courts in condemnation proceedings when those courts have adopted rules of law that operate to deny the landowner's right to obtain just compensation. As the Court said in *McCoy* v. *Union Elevated R.R. Co.*, 247 U.S. 354, 363 (1918):

> "We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right

> to just compensation. If the necessary result was to deprive him of property without such compensation then due process of law was denied him, contrary to Fourteenth Amendment."

The Court went on to state:

> "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation." 247 U.S. at 365.

This is precisely what has happened in the present case. The New York court has formulated an arbitrary rule—that a condemnation award may be based entirely on a landowner's acquisition and development costs, without consideration of sales of other properties or any other market factors or indices of value—which has literally made it "impossible for [claimant] to obtain just compensation."

This Court has long made it completely clear that a condemnation award cannot constitutionally be premised on costs alone, or on the basis of any formula or arbitrary rule. Rather, the Court has continually held that, in order to meet the constitutional requirement of just compensation, a court must consider all pertinent market data, and all factors that would be considered by any prospective purchaser of the property.

Over 80 years ago, in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), this Court emphasized the critical importance of assuring that just compensation be paid for condemned property and that compensation may not be predicated on cost factors.

The Court there also noted that questions as to the proper methods of valuing condemned property were of the utmost importance for consideration by the Court, since "in any society the fulness and sufficiency of the securities which surround the individual in the use and

enjoyment of his property constitute one of the most certain tests of the character and value of the government." 148 U.S. at 324.

The Court has repeatedly held in following cases that a condemnee's costs could not be regarded or adopted as the measure of value in condemnation.

In *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 122, 123 (1924), concerned with the valuation of a ship, the Court said in apt analysis that the Court of Claims had erroneously based its award "upon the assumption that the money paid by claimant in furtherance of planning and building the ship was expropriated," but that "there was no requisition of money," rather of an interest in property, and that this interest must necessarily "be distinguished from [claimant's] expenditures for the production of the ship." Thus the Court explicitly rejected the condemnor's argument that the claimant "should have judgment only for an amount sufficient with what already has been paid to it to make up 'the amount actually invested in the ship taken,' " and stated governing truth:

> "The value of property may be greater or less than its cost; . . . It is the property and not the cost of it that is protected by the Fifth Amendment." 265 U.S. at 123.

In *Olson* v. *United States*, 292 U.S. 246 (1934), the Court again made it clear that an owner's costs could not, consistent with the constitution, be adopted as the basis for a condemnation award, since it was the owner's *property* that had been condemned, not his costs in acquiring or developing it. An award based on costs would be improper, as the condemnor could not "by any means confiscate the benefits . . . of the owner's bargain" in acquiring the property. The owner must receive, the court said:

> ". . . the market value of the property at the time of the taking contemporaneously paid in money. It may be more or less than the owner's investment.

> He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him . . . the public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. . . . it is the property and not the cost of it that is safeguarded by state and federal constitutions." 292 U.S. at 255.

The Court similarly held in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949), that costs could not be the basis of valuation even when unique property was involved, and spoke of original cost as "the false standard of the past." Likewise in *United States* v. *Commodities Corp.*, 339 U.S. 121, 130 (1950), the Court ruled that costs were not relevant in determining just compensation, saying that the dispute about how to determine costs was beside the point, since "[t]he general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price."*

The Court has made equally clear the *standard* that is to obtain in determining market value—the price that would be paid in a normal negotiation between a willing buyer and seller on the vesting date, meaning that all the facts and factors that would enter into consideration between such parties must be considered and enter into the determination of the condemnation court.

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* The legal principle that value cannot be based on costs is solidly premised on sound appraisal practice and on the wisdom and experience of the market place. As a leading real estate appraisal treatise puts it:

> "However, it should be re-emphasized that land value has little to do with the historic cost of the land or with the original price plus the expense of making it usable, putting in underground and other improvements."

American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* (4th ed. 1964), p. 228.

As stated in *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U.S. 206, 208 (1879):

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

In *New York* v. *Sage*, 239 U.S. 57, 61 (1915), the same market test was enunciated:

> ". . . what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact. . . ."

In *Brooks-Scanlon Corp.* v. *United States, supra*, the holding was that the award must be "the sum which, considering all the circumstances . . . would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." 265 U.S. at 123-24. The opinion listed a host of illustrative factors that a purchaser and seller of the property there involved would consider, and that were thus required to be considered by a condemnation court so as to arrive at "the sum which will put [claimant] in as good a position pecuniarily as it would have been if its property had not been taken." 265 U.S. at 126.

In *Olson* v. *United States, supra*, the Court addressed the problem of valuing "unique" property that is not ordinarily bought and sold. It said that in this situation "market value" remained the test, and that "all the circumstances" must then be considered, so as to reach "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser willing to buy." 292 U.S. at 257. The Court emphasized that in the absence of a readily ascertainable market value the inquiry into value is *not* to be *restricted*, but must necessarily be far-ranging:

> "In making that estimate there should be taken into account all considerations that fairly might be

brought forward and reasonably be given substantial weight in such bargaining." 295 U.S. at 257.

In *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra,* the Court again dealt with "unique" property and reiterated the rule that all factors "bearing on what a prospective purchaser would have paid" must be considered and expressly ruled that "scattered" sales of other properties must be considered for their "bearing" on what a purchaser would pay for claimant's property. 338 U.S. at 402. As a leading valuation treatise put it, in discussing sales as a measure of value, "one of the reasons why the courts have declined to announce rigid rules is their recognition that the law, like the appraiser, must get along with the best evidence available . . ." 1 Bonbright, *Valuation of Property,* p. 137 (1965 ed.).

As recently as 1973, the Court reversed an award because the lower court had failed to consider the factors that a purchaser and seller in the market would have taken into account. *Almota Farmers Elevator & Whse. Co.* v. *United States,* 409 U.S. 470, 478 (1973). As the Court said, "That is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota."

Because a condemnation court must consider all facts and factors that a buyer in the market would consider and thus reach a valuation that would correspond with the price such a buyer would pay upon those considerations, the Court has said that the determination of just compensation cannot be reduced to a "formula", *United States* v. *Cors,* 337 U.S. 325, 332 (1949). As Justice Frankfurter said in his concurring opinion in *Toronto,* when valuing "property rarely bought and sold" it is important that the trier of the facts not be "cramped by rules that are too rigid and too artificial"—he must be given "considerable freedom from hard and fast rules in determining what data are

relevant and what significance may be drawn from them." 338 U.S. at 407, 408.

In the present case the New York court has turned its back on all the teachings of this Court on condemnation valuation and governing constitutional principles. It has resorted to a "formula"—"rigid" and "artificial"—and one that this Court has most emphatically held cannot be the basis of a condemnation award. It has paid no heed to the standard of judgment mandated by this Court and has rejected all considerations that would enter into that judgment.

There can be no doubt as to the things a prospective purchaser would look to and consider in contemplating the purchase of real estate for investment purposes. He would consider first the uses to which the property could be put, and particularly what would be its most profitable use. If he was considering the property for residential building and renting he would get the demographic facts on the needs and demands for housing, the trends of population movement in respect to areas and kinds of housing sought, and consider the appeal and amenities of the particular property as compared with other areas and available properties.*

The second thing the prospective purchaser would consider is the profit potential in the property, the costs of

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* What the prospective purchaser would have found in this case was a critical shortage of housing in the New York metropolitan area, a strong movement of people out of the City center to outlying areas of the City and suburbs in search of recreational facilities and amenities, a strong trend to apartment house living, and a preference for the outskirts of Queens County where there was a growing demand and less than a 1% vacancy rate. He would have found in Breezy Point, within an hour's commute by car or public conveyance to the City center, spaciousness, a climate warmer in winter and cooler in summer than the City generally, matchless recreational facilities at hand, and a unique opportunity to build a whole self-contained community with all the environmental protection that could be wished. Undeniably, people in vast numbers would seek living accommodations there. The City appraisers conceded as much, but without reason contended that they would want to build their own homes rather than live in apartments—a premise contrary to the established and growing trend.

construction, the operating expenses, and rents that could be obtained.

The third thing he would consider would be competing land investment opportunities and market prices shown by sales of other properties that would give some indication of the market value of the property in contemplation, considering its pluses and minuses. Such process of comparative valuation that is employed in the market place every day is the basis of the uniform condemnation law and practice throughout the country of making "adjustments" for differences in properties.

And, of course, the prospective purchaser would consider the state of exploitation of the property, the extent and detail of the planning, the agreements with the City on zoning and municipal services, the construction under way and any leases that might have been made. He would be particularly aided by learning the costs of completing the project—so definite here that the parties were in agreement about them. Even if he were not interested in acquiring the portion of the property on which construction had principally taken place, he would regard as very important all that had been done adjacent to the property he was interested in.

For a court in a condemnation case to strike from consideration all of these things—disregard best use, shut its eyes to developmental accomplishments, rule out of consideration the vital matter of the income that might be expected from development, and pretend that no sales of other properties could be any indicator of the value of the property under consideration unless so like it that there are no differences to evaluate—is a flight from all realism.

To then hold, as the Court of Appeals did in its second decision, remanding the case to the Appellate Division to do its bidding, that the "proper" award for the taking of land "unexploited or only partially exploited" is the amount the owner has expended on the property is to deny all the teachings of valuation, condemnation and constitutional law. It means that unless exploitation has been

completed, no valuation or consideration of valuation essentials need be undertaken—just add up expenditures, ignoring the time, talent and effort devoted to the enterprise and the achievements thereof and all market data, and saving the bother of condemnation trials one has instantly a ready made award.

The Court of Appeals was correct in saying in its final words on the third appeal to that court that appellant asked it to "reverse our prior determinations." Beginning with a motion to reargue that Court's first decision and extending to its last word, claimant vigorously contended that the Court's whole course of excluding from consideration everything but costs—capitalization of expected income included—was a denial of constitutional rights.

As far as we can determine, while this Court has expressly held that even "scattered sales" of other properties must be considered, it has not *specifically* spoken to the use in condemnation of the capitalization of estimated future income as a valuation tool. It has, however, said time and again, as has been noted, that the constitutional mandate of just compensation requires a court to consider all factors that would be considered by a prospective purchaser of the property, and it is beyond question, as was agreed by the real estate experts for both sides, that any prospective purchaser of the property would employ the capitalization process in determining how much to pay for the property. The clear import of this Court's rulings, therefore, is that a condemnation court, which must apply the same criteria as a prospective purchaser of the property would, should take and consider capitalization evidence, certainly when a development is underway.

There are well-considered decisions of other eminent courts that have concluded that capitalization should be utilized in such a case as the present one, even where development had not extended nearly so far, precisely because any purchaser would employ the capitalization process in valuation.

Particularly significant is the decision of the Court of Appeals for the Fourth Circuit in *United States* v. *25.406 Acres of Land*, 172 F.2d 990 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949). That case involved a proposed high-rise apartment house project which was to consist of an apartment hotel and several apartment buildings. At the time of the taking, no construction whatever had been commenced, and no leases had been obtained, although development had been planned, and financing and construction arrangements had been made. Thus, the project there was far less advanced than that in the present case, where construction had been substantially completed on eight of the apartment buildings and the shopping center, leases for all but one of the stores in the shopping center had been obtained, and two beach clubs were in full operation, and there was agreement between the parties with respect to construction costs and operating expenses.

The Court (per Parker, C.J.), held that it was proper and appropriate to use the capitalization of estimated future income in valuing the property, since the capitalization testimony ". . . related not to the nebulous cost of constructing a vague hypothetical project and the estimated income to be derived therefrom, but to the cost and expected income of a project which, according to the evidence, was definitely in the process of achievement." 172 F.2d at 992.*

* Not only did the Court of Appeals in the present case rule out of consideration the state of development and achievement at the time of condemnation that clearly was a most important fact for required consideration in any undertaking to value the property at the time of taking, but the pretense for ignoring it as non-existent, and hence justifying the exclusion from consideration of capitalization and sales of properties in developed areas, was itself unconscionable and unconstitutional. Accepting the City's gerrymandering out of the condemnation the acreage on which most of the development had taken place as excluding all that development from consideration was not only wholly unrealistic and unfair (as the trial court said, claimant could not be penalized by selective condemnation) but flew directly in the face of the ruling by this Court in *United States* v. *Miller*, 317 U.S. 369, 376 (1943), that "a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of all or part of it."

The court emphasized that a prospective purchaser of the property necessarily would consider the estimated income expected to be received from the project, so a court determining value should hardly "close its eyes" to this factor. The court said:

> "It seems equally clear that in estimating the value of the property for this use, i.e., what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed. Certainly such matters would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. As was well said by the late Judge Henry G. Conner, one of the great judges of this Circuit, 'It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.'" 172 F.2d at 993.

See also, United States v. *Waterhouse*, 132 F.2d 699, 703 (9th Cir. 1943), *aff'd mem.*, 321 U.S. 743 (1944), where the Court of Appeals for the Ninth Circuit, in a ruling that was affirmed without opinion by an equally divided Court, held that capitalization evidence could be utilized "if there is any substantial evidence to show that the adaptability of the lands in question for the uses testified to was 'reasonably probable,'" since:

> ". . . in determining what a willing buyer would pay for the land, such buyer would estimate the net income from the land when used as he would use it,

and arrive at a value by capitalizing such income from which he would deduct his required profit, and thus arriving at an amount which he, as a willing buyer, would be willing to pay for the land." 132 F.2d at 702.

The holding in that case, that capitalization evidence is admissible whenever the use to which it is addressed is reasonably probable, leads to the final point to be made in this petition—that the decision of the New York Court of Appeals is a violation of the first essentials in a valuation that can qualify as just compensation, namely, that it be based on the highest and best use of the property and its value at the time of taking.

It has long been a basic and unquestioned postulate of the law of just compensation that property must be valued at its worth for the highest and best use to which it could be put *at the time of condemnation*, and that prior use is no determinant of best use. This postulate has been stated and consistently followed by courts throughout the land and declared by this Court as a primary guide to just compensation. *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U.S. 206 (1879); *Olson* v. *United States*, 292 U.S. 246 (1934).

The New York Court of Appeals, which has likewise declared the principle, did not say anything different in this case; it simply ignored the principle and acted contrary to it. The adoption of an owner's costs as an award is in itself a disregard of best use, certainly so unless there was a consideration and determination of best use and that the acquisition price represented best use value. The New York court made no such determination and made no mention of best use in any of its opinions, when it was a primary consideration pressed upon the court by claimant. And in this case there had been an explicit and conclusive finding of best use—that it was for an apartment house community, the use for which it was zoned and under development with

enthusiastic City cooperation—and it was the obvious fact (conceded as to the purchase by the Cooperative) that acquisition costs did not represent any best use valuation on either the acquisition by claimant or the Cooperative. Indeed, it was conclusively found by the triers of fact that the prices in these transactions did not represent the fair market value of the property for any use, and the assignment to the Cooperative was held to be a "forced sale," the type of transaction which may not even be considered in determining value. See 1 Orgel, *Valuation Under Eminent Domain*, § 22, at 99-102 (2d ed. 1953).

Not only was it acknowledged by the City appraisers that a bungalow use—which was the only use of the property at the time of claimant's purchase and the use for which the Cooperative bought—was not the best use, not even according to the City appraisers' claimed best use for one and two family houses (which they acknowledged was a far less valuable use than an apartment house use), but at the time of claimant's acquisition it was highly doubtful, because of the tenants' strong position and opposition, that the property would ever be usable for anything other than a bungalow use. Clearly, the prices paid by both claimant and the Cooperative were at most a measure of value only for a bungalow use.

At the time of condemnation, however, there was a complete change—a "transformation" as the second trial judge said—peace had been made with the tenants at the price of yielding to them the land they wanted to continue their bungalow colony, and claimant's property was advanced in development for an apartment house community.

Plainly, the Court of Appeals' laying down a rule of law that valuation was to be made on the basis of claimant's costs—without a mention of best use in any of its three opinions and with disregard of the entire development over three and a half years being the premise of its decision—was not only a violation of the basic requirement that valuation be based on best use, but was a violation of the

basic requirement that valuation be made as of the time of condemnation. In short, the court's decision was the antithesis of the law of constitutional valuation and compensation.

CONCLUSION

A writ should issue to permit the Court to review the decision of the New York Court of Appeals that has denied the constitutional rights of petitioner, and to assure not only that an award will be made that respects those rights, but also assure that the decision of the New York court does not become a blueprint for denying just compensation whenever an exceptional property is condemned.

Respectfully submitted,

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September 7, 1976

Supreme Court, U. S.
FILED
SEP 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Opinion of the Court of Appeals Dated June 10, 1976

State of New York
Court of Appeals

2 **No. 249**

In the Matter of the

CITY OF NEW YORK,

Respondent,

(The lines of Rockaway Point Boulevard and the lines of Beach 222nd Street and other streets in the Borough of Queens)

ATLANTIC IMPROVEMENT CORPORATION,

Appellant.

(249)

MEMORANDUM:

On the prior appeals we considered the appellant's argument that the Constitution prohibits the court from excluding evidence of comparable sales. We also considered the related argument that the award for the condemned properties should not be lower than the value placed on certain "inferior" comparables. The simple answer is that the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis comparable to the condemned property. In other words the proffered comparables were neither inferior nor superior to the condemned property, but rather as we noted on the first appeal, they were so radically different in size, adjacent development and physical location "as to throw no help-

ful light on the fair market value of the land condemned'' (28 NY2d 465, 471). This same point was noted by Justice Shapiro on the second appeal (44 AD2d 694). The appellant in effect asks that we reverse our prior determinations, but on the record there is absolutely no basis for doing so.

On this third appeal then, the Appellate Division quite properly rejected the reconsideration of these so-called ''comparables''. Since it has not been made to appear that the determination made by the Appellate Division was other than in conformity with the direction of this Court in remitting the case to that court for reappraisal, the order of the Appellate Division should be affirmed.

• • •

Order affirmed, with costs, in a memorandum. All concur.

Decided June 10, 1976

Opinion of Appellate Division on Remittitur Dated June 23, 1975

(48 App. Div. 2d 895)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 23, 1975.

HON. FRANK A. GULOTTA,
Presiding Justice

HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. ARTHUR D. BRENNAN
HON. J. IRWIN SHAPIRO,
Associate Justices

In the Matter of THE CITY OF NEW YORK,

Respondent-Appellant,

(the lines of Rockaway Point Boulevard and other streets in the Borough of Queens).

(Index No. 13004-1963)

In the Matter of THE CITY OF NEW YORK,

Respondent-Appellant,

(the lines of Beach 222nd Street and other streets in the Borough of Queens).

(Index No. 7324/1964.)

ATLANTIC IMPROVEMENT CORPORATION,

Appellant-Respondent.

Opinion of Appellate Division on Remittitur
Dated June 23, 1975

By a prior order dated April 15, 1974, this court affirmed two first separate and partial superseding final decrees of the Supreme Court, Queens County, both entered July 11, 1973, but, on November 27, 1973, the Court of Appeals modified said order of this court by reversing the award to the claimant and remitting the proceeding to this court for reappraisal in light of the dissenting opinion in this court (Matter of City of New York [Atlantic Improvement Corp.], 44 AD2d 694, mod. 35 NY2d 845).

Now on remand, (1) the decree as to Damage Parcels Nos. 1 to 16, inclusive, and Nos. 16A, 16B, 18, 19 and 20, is modified, on the law and the facts, by reducing the award therein to $7,750,000 and (2) the decree as to Damage Parcels Nos. 22 to 34, inclusive, is modified, on the law and the facts, by reducing the award therein to $7,250,000. As so modified, decrees affirmed, without costs.

In accordance with the memorandum of the Court of Appeals, we have reappraised this case "within the legal framework set forth in the dissent." In so doing, we have arrived at the same result, and for the same reasons, expressed in that dissent.

GULOTTA, P.J., HOPKINS, MARTUSCELLO, BRENNAN and SHAPIRO, JJ., concur.

Opinion of the Court of Appeals
Dated November 27, 1974

(35 N.Y.2d 845)

No. 485

In the Matter of The City of New York (Beach 184th St. to Beach 201st St. in the Borough of Queens).

In the Matter of The City of New York (Beach 201st St. to Beach 222nd St., etc., in the Borough of Queens).

Atlantic Improvement Corp.,

Respondent,

The City of New York,

Appellant.

Memorandum. The order of the Appellate Division should be modified, without costs, by reversing the award to claimant and the matter remitted to the Appellate Division for reappraisal in light of the dissenting opinion. We agree with Justice Shapiro that the award reflects substantial if not total disregard of our previous directions in this case (28 N Y 2d 465). The award shows that great emphasis was placed upon the Birchwood "comparable", which should not have been considered, and that little, if any, weight was given the prior sales of this property. We also agree that the proper test for vacant land, unexploited or only partially exploited, is that found in *Matter of City of New York (Chestnut Props. Co.)* (39

A D 2d 573, affd. 34 N Y 2d 800) and cases therein cited. Since the parties agree that they have exhausted their proof, and since we agree that the dissent has identified pervasive errors of law, we must remit to the Appellate Division for a reappraisal of the case within the legal framework set forth in the dissent. We cannot go so far as to dictate the amount of the award and thus express no view on the actual amounts arrived at in the dissent.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER and STEVENS concur; Judge RABIN taking no part.

Entered: November 27, 1974.

[SAME TITLE]

Motion for reargument or clarification denied.

May 1, 1975

Opinion of Appellate Division and
Dissenting Opinion of Shapiro, J.
Dated April 15, 1974

(44 App. Div. 2d 694)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 15, 1974.

Hon. FRANK A. GULOTTA, Presiding Justice
Hon. JAMES D. HOPKINS)
Hon. M. HENRY MARTUSCELLO)
Hon. J. IRWIN SHAPIRO)
Hon. ARTHUR D. BRENNAN) Associate Justices

In the Matter of the City of New York,
Respondent-appellant

(the lines of Rockaway Point Boulevard and other streets in the Borough of Queens).

(Index No. 13004-1963.)

In the Matter of the City of New York,
Respondent-appellant

(the lines of Beach 222nd Street and other streets in the Borough of Queens).

(Index No. 7324-1964.)

Atlantic Improvement Corporation,
Appellant-respondent.

Opinion of Appellate Division and Dissenting Opinion of Shapiro, J. Dated April 15, 1974

Two first separate and partial superseding final decrees of the Supreme Court, County of Queens, both entered July 11, 1973, one as to damage parcels 1 to 16, inclusive, and 16A, 16B, 18, 19 and 20, and the other as to damage parcels 22 to 34, inclusive, affirmed on the opinion of the trial court, without costs. No opinion.

GULOTTA, P.J., MARTUSCELLO and BRENNAN, JJ., concur.

SHAPIRO, J., dissents and votes to reduce the award in the decree as to damage parcels 1 to 16, inclusive, and 16A, 16B, 18, 19 and 20 to $7,750,000 and to reduce the award in the decree as to damage parcels 22 to 34, inclusive, to $7,250,000, with the following memorandum, in which HOPKINS, J., concurs:

Although this proceeding was retried, as directed by the Court of Appeals (Matter of City of New York [Atlantic Improvement Corp.], 28 N Y 2d 465), many of the same errors in computing value committed upon the first trial were repeated upon the retrial.

The subject property is located at the westerly end of the Rockaway peninsula. It consists of some 785 acres and is known as Breezy Point.

When Breezy Point was sold to the claimant's predecessor in 1960 the land was improved with two beach clubs and approximately 3,000 small beach summer cottages which had been constructed on lots leased to the purchasers of the cottages. The vast majority of the cottages were on the central portion of the tract. By that time about 400 of the dwellings were used for year-round occupancy. The entire

785-acre tract was placed on the market in 1958. It was listed wtih various brokers and attempts, all unsuccessful, were made to put syndicates together to acquire the property.

On February 9, 1960, Rockaway Point Development Corp. ("Rockaway Point") contracted with Urban Improvement Corp. ("Urban"), a predecessor of the claimant, to sell it the 785-acre tract for $17,500,000, all cash. Title was to close on October 1, 1960, adjournable to January 10, 1961, time to then be of the essence. Rockaway Point advised the buyer that the owners of the cottages would resist any development requiring their ouster. The purchaser nevertheless announced that it planned to create a "city within a city" by erecting high-rise apartment houses and made known its intention not to renew the tenants' 10-year ground leases. The tenants thereupon, in an effort to protect their homes and to resist any attempt to destroy their investments, united and formed the Breezy Point Cooperative ("Co-op").

On December 8, 1960, Urban assigned to Co-op the right to purchase 415 acres of the property in return for the latter's agreement to pay $11,990,750 of the $17,500,000 which Urban had contracted to pay for all 785 acres. This left Urban with two areas: a 143-acre section at the eastern end of Breezy Point (the "Twin Parks" area), and a 209-acre section at the western end (the "Tip" area). Additionally, by virtue of a restrictive covenant agreement, a right of way consisting of approximately 16 acres was reserved by Urban in order to give it access to the otherwise landlocked Tip. Urban agreed to relocate 250 bungalows in the Twin Parks area to the section owned by Co-op.

The transaction with Co-op reduced Urban's purchase cost from $17,500,000 to $5,509,250 and left it with 370 acres, not including a 21-acre section not condemned. Interestingly, the claimant's efforts to obtain FHA mortgages for its

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proposed development of apartment houses in the 21-acre area not condemned (which lies adjacent to the Twin Parks section) were unsuccessful because the FHA determined that the erection of high-rise apartments was economically unfeasible. The FHA, in its rejection, noted that the land was in an area far removed from transportation and employment and was constantly flooded during periods of storms, tides and hurricanes and that the cost of fill, street improvements, sewers and water would be inordinately excessive.

In June, 1962 the claimant acquired title to 196 acres of land under water, or formerly under water, by State grant at a cost of $96,359, or one cent per square foot.

The Court of Appeals, in reversing the previous total award of $39,775,208, pointedly noted that it was more then seven times the amount that the land, in substantially the same condition, had cost the claimant only three years prior to the condemnation. It commented that only a small portion of the claimant's extensive development plans had been set in motion; and that was entirely in the 21-acre area not taken by condemnation. Although detailed plans for the Twin Parks area had been projected, no work had been started or, for that matter, even contracted for. The Court of Appeals referred to the proposals for the Tip as "a plan without detail" (*supra*, p. 470). It aptly described the Tip as "low-lying and exposed to strong tidal and wind action," requiring "extensive fill to be usable for any residential development" (*supra*, p. 470). The projected utilization of the Twin Parks area, it said, was dependent upon the acquisition from the city of land under Jamaica Bay which, if and when acquired, would require extensive fill. Under these circumstances, the Court of Appeals held that it was improper, as a matter of law, to award damages based on capitalization of estimated income, as fair market value

could not be properly measured on projections of income from nonexistent structures on land which required extensive physical change to render it usable for the intended purpose.

The court also noted that the proof offered of comparable sales shed no light on value. The proffered sales were considered by the court to be radically different in size, adjacent development and physical location. It stated the rule to be applied on the retrial in the following unmistakable language (*supra*, p. 472):

> "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration *should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself*" (emphasis supplied).

Unfortunately, Special Term in rendering a total award of $31,000,000 ($16,300,000 for the Twin Parks area and $14,700,000 for the Tip) ignored the guidelines laid down by the Court of Appeals and, in the main, repeated the mistakes which had resulted in the original grossly excessive award. Special Term held that the best use of the property was as a Planned Unit Development (hereafter PUD) consisting of an apartment house complex with ancillary facilities. Despite the clear statement of the Court of Appeals to the contrary, it held that the sale to the Co-op was of no aid in determining value and that the sale to Urban had been for less than the full market value. These were therefore excluded from its consideration. While

agreeing that the claimant's proof of other sales did not produce any which were truly comparable, the Special Term found "a glimmering of the path to the market place" in a sale in Bayside. It concluded that there were truly no appropriate comparable sales, that the land was vacant and unproductive, that there was no income to capitalize and that the actual purchase price and the assessed valuation did not furnish a true guide to value. It therefore made a valuation based upon what it denominated as basic equitable principles of fairness.

In my considered opinion, the awards under review are neither fair nor equitable but, on the contrary, represent an unconscionable raid upon the public purse. In the face of proof which clearly demonstrated the economic and practical unfeasibility of the erection of a PUD, Special Term's finding that a PUD was the highest and best use to which the property could be put is inexplicable.

The community planned for the Twin Parks area was to contain 55 apartment houses, including dozens of high-rise buildings at a total development cost of from $150,000,0000 to $200,000,000. As noted, the FHA considered even a small part of any such proposed development to be economically unfeasible. It is not open to dispute that work in the Twin Parks area had neither been contracted for nor started at the time of condemnation, that the financing procurable was grossly inadequate and that the claimant was wholly inexperienced in the development of even small scale apartment house complexes.

In such a situation, where the proposed high risk development is to take place in a remote, inaccessible area and where there is a complete absence of credible proof that the venture is economically sound, we may not, by any common-sense standard, assume its ultimate success. Indeed, every realistic sign points to its probable failure. It

must be remembered that approximately seven feet of fill was required to first raise the land to grade and that 25% of all the acreage would necessarily have to be devoted to streets and nonincome-producing public facilities. The claimant itself estimated that it would take seven years to develop the Twin Parks tract alone for the proposed use. It estimated its development costs therefor at between $150,000,000 and $200,000,000. Completion of its PUD concept of creating a full-grown community on both tracts would therefore require at least twice that investment. *However, in over a decade, not a single conventionally financed high-rise apartment house had been successfully completed anywhere on the Rockaway peninsula.*

Furthermore, the development plan hinged on acquiring and filling in a sizable tract of city-owned land in Jamaica Bay. The remapping of streets, rezoning, agreements with the city on public schools, police and fire protection, etc., had already encountered substantial public opposition. Legislation aimed at alienating the city's land under water had not only failed of passage in 1962, but was not even reintroduced at the 1963 legislative session.

With conventional mortgage financing covering only half the amount per apartment sought from the FHA, the claimant had commenced construction of eight apartment houses on the 21-acre site, without provision for schools and without encountering the remapping, rezoning and land-acquisition problems inherent in the development of the balance of the planned community. Although it had mortgaged *all* of its land and assets to finance those buildings, it faced a shortage of $6,500,000 in the funds required for their completion at the time it abandoned construction.

It is therefore clear that normal financing was not available for executing the PUD concept in this remote area and the contemplated seven-year development period for the

smaller tract indicated that it would require at least 14 years before the entire PUD could be completed.

The claimant made no attempt to establish that the abandoned buildings would have proven profitable, so as to afford some basis for assuming that a similar development of the entire tract might also have proven economically viable. In sum, the rule that an estimated income stream from a nonexistent improvement may not be valued by capitalization was used by the claimant to avoid putting in proof that the PUD could be profitably developed. Its expert, Mr. Powers, did not testify as to the economic viability of the project. Indeed, he indicated that he had not considered questions of cost, income or profitability.

Contrariwise, the city's experts testified extensively at both trials as to the economic viability of the PUD concept and concluded that it would have been doomed to failure. Their views, unlike that of the claimant, are amply supported by the evidence.

Additionally, the awards violated the rule that a prospective use which is no more than a hypothetical hope in the mind of the claimant may not be the basis for a finding of value (see Matter of City of New York [Shorefront High School—Rudnick], 25 N Y 2d 146, 149; Triple Cities Shopping Center v. State of New York, 26 A D 2d 744, affd. 22 N Y 2d 683; Matter of City of New York [Broadway Cary Corp.], 40 A D 2d 865, affd. —— N Y 2d :—— [dec. Feb. 20, 1974]). The proposed use was just a hypothetical plan. The development of the Twin Parks area required (1) the acquisition of city land, (2) the ability to properly finance a project whose history indicated the unlikelihood that proper financing could be arranged and (3) thereafter, if that were in fact accomplished, the construction and rental of 55 apartment houses in a remote area inaccessible to transportation.

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The Tip presents an even more outrageous picture. The plan for its development lacked detail. The amount of fill required to raise its upland to grade was 2,150,000 cubic yards. The upland had to be elevated by approximately seven feet.* Work was not to begin on this area for many years. The award for this area was thus improperly based upon a sequence of conjectures (cf. Sparkill Realty Corp. v. State of New York, 268 N. Y. 192, 197).

Although Special Term properly concluded that the proof of sales of other properties revealed none which were truly comparable, it placed some reliance upon the sale of a 52-acre site in Bayside, Queens, overlooking Little Neck Bay, known as Birchwood Towers. That property was to be developed for use as an apartment house complex. It was error, as a matter of law, to consider such sale.

The evidence established that Bayside was a developed community at the time of that sale. It contained apartment houses, small homes, garden apartments, shopping facilities, churches, a community college and parks. The property was located directly across the street from a vast apartment house complex and one block from another such development.

The value of land in a developed residential community such as Bayside may not be attributed to raw, vacant land in a remote inaccessible area. The value imparted to the

* Compare Giarrusso v. State of New York (19 A D 2d 582), in which 7½ feet of fill were required to make 32 acres usable. The claimant's expert valued the property at the price it would bring as filled property and deducted the cost of the fill. In rejecting his testimony the court held (pp. 582-583):

> "It may be inferred from the proof that the accomplishment of such a massive filling job, if done by any normal method, could only take place years or decades in the future. The testimony upon this subject was sheer speculation and an unsound method of computing damage that may not be adopted."

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Birchwood site by the previous apartment house developments on immediately adjoining land was alone sufficient to vitiate any comparability to acreage in a remote area adjoining two bungalow colonies even were we to disregard the reality of the thriving and previously existing community in Bayside.

This court was confronted with a somewhat similar situation in Matter of City of New York [Chestnut Prop. Co.] (39 A D 2d 573). We there noted (pp. 573-574):

> "In our opinion it was error to predicate the award upon the value of a nonexisting income stream from land as if it were improved by buildings which had not been constructed at the time title vested (Arlen of Nanuet v. State of New York, 26 N Y 2d 346, 350). Elaborate forecasts of income from nonexisting structures on land which needed large physical change to be usable for its purposes are not a proper measure of fair market value (Matter of City of New York [Atlantic Improvement Corp.], 28 N Y 2d 465, 470). We are in accord with the city's contention that where, as here, the planned development of land is interrupted by condemnation, the best criterion of market value is the price a purchaser would pay for the land in the state of exploitation to which it had progressed at the time of vesting of title in the condemnor. In the present proceeding the experts for the respective parties agreed that there was no direct comparable market data available to indicate the value of the subject site. In this contingency, the recent actual sale price of the subject property was the best and most substantial evidence of market value. Additionally, the claimant is entitled to be recompensed for developmental enhancement of the property in preparing it for its contemplated use."

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In this case, as in the *Chestnut Properties* case, there is no comparable market data available. Hence, the proper method of valuation is actual sale price plus recompense for developmental enhancement, particlarly as the risks inherent in this venture are much greater than those in *Chestnut Properties.*

The claimant's expenditures include the $5,500,000 purchase price, $5,600,000 on the partial construction of the abandoned buildings, $3,400,000 to rebuild certain beach clubs, $640,000 in bonuses to raise capital, plus real estate taxes, architect's fees, legal fees, etc., totaling, in all, $19,300,000. It has already received $5,600,000 for its abandoned buildings and $4,000,000 for the beach clubs by virtue of the award made at the first trial. At least $1,100,000 will be paid for the land in the 21-acre remainder area, as the city has appraised the value of that land at $54,500 per acre. The claimant's compensation will therefore total at least $10,700,000, independent of the award for the land here under review.

As the awards here will compensate the claimant for the land, we can arrive at a figure for developmental enhancement by deducting from the figure of $19,300,000 the amount allocated by the claimant to its purchase price for the unimproved land—$4,400,000, leaving approximately $15,000,000. We must then deduct from this figure the approximately $10,700,000 already secured (or receivable) by the claimant, which leaves a figure of $4,300,000 representing the costs of developmental enhancement. This figure should be added to the market value of the land based upon the recent actual sales price. (The length of time for which Breezy Point was on the market—*without a buyer*—prior to that sale indicates, contrary to the finding of Special Term, that the price paid was an adequate reflection of true value.)

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The award here made of $31,000,000, considering the amounts already paid to the claimant, would leave it with a profit (exclusive of interest) of about $22,400,000 over its total expenditures. Such a result is unconscionable and insupportable.

Special Term also erred in fixing the value of land under water. It adopted the "ratio method" and fixed its value at one-third of the upland value. This method was predicated upon the assumption that eight acres of land had annually accreted in the 10 years prior to condemnation and would continue to accrete at that rate in subsequent years.

However, the record reveals that the annual rate of accretion had fallen below three acres after 1961, and was down to 2.2 acres after 1967. Hence, the theoretical future accretion of eight acres per year was based on sheer conjecture. I credit, in large part, the valuation of the city expert Tuchler, who included in his total estimate of value all land that might accrete in the future. His appraised value included five cents per square foot for underwater land at the Tip, which was substantially above the one cent per square foot which the claimant had paid the State therefor; and from 8 to 15 cents per square foot for the underwater land in the Twin Parks area, which was twice what the claimant was to pay the city for its underwater land in Jamaica Bay.

On this record there is no justification for an award for the Twin Parks area which is in excess of $7,750,000 or for the Tip area which is in excess of $7,250,000. I would modify the decree accordingly and as so modified would affirm.

Opinions of the Supreme Court of the State of New York, Castaldi, J.

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part IV-A.

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in real property where not heretofore acquired etcetera, within (1) the lines of ROCKAWAY POINT BOULEVARD from Beach 184th St. to Beach 201st St., etcetera, in the Borough of Queens, City of New York.

Index No. 13004/63 (INITIAL PROJECT AREA)

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in the real property where not heretofore acquired etcetera, within (1) the lines of a park bounded generally by the westerly line of Beach 222nd St., and its prolongations, Rockaway Inlet and Atlantic Ocean etcetera, in the Borough of Queens, City of New York.

Index No. 7324/64 (TIP)

Supplemental Opinion of Castaldi, J.,
Dated June 19, 1973

Dated June 19, 1973

By CASTALDI, J.:

In its memorandum decision of June 13, 1973, the court stated that "the court has made the explanation sought by the City regarding the arithmetical unit value of both the Initial Project Area and the Tip". In its oral decision of June 5, 1973, the court recited the requested particulars as to the valuation of the Initial Project Area ($2.65 per square foot for the upland and 90 cents per square foot for the land underwater). With relation to the Tip area, the court pointed out in its oral decision that the lump sum award of $14,700,000 for both the upland and the land underwater was on the overall basis of one dollar per square foot. Further, the court observed that its "valuation of the Tip on an overall unit basis is about 47.5 per cent of the valuation found by the Court for the Initial Project Area" (Minutes of Hearing on Objections, pp. 2093 and 2102). For the further enlightenment of counsel, the court attributed to the Tip area a valuation of $1.35 per square foot for the upland and 45 cents per square foot for the land underwater.

The final decree to be submitted by the Corporation Counsel shall be in accordance with the court's oral decision of June 5, 1973, the memorandum decision of June 13, 1973, and this supplemental memorandum decision.

M. A. C.
J. S. C.

Supplemental Opinion of Castaldi, J.,
Dated June 13, 1973

Dated June 13, 1973

By CASTALDI, J.:

On June 5, 1973, the court rendered its oral decision overruling all of the City's objections to the tentative decree except that "the court has made the explanation sought by the City regarding the arithmetical unit value of both the Initial Project Area and the Tip." (Minutes of Hearing on Objections, p. 2105.) Upon the hearing of objections, the City raised an additional issue as to "whether or not substantial compensation was granted for Damage Parcel 18." This issue has now been withdrawn by the City.

The Corporation Counsel is directed to submit the appropriate final decree.

M. A. C.
J. S. C.

Oral Opinion of Castaldi, *J.*
Dated June 5, 1973

The Court: Gentlemen, this Court has reviewed his notes that the Court deems pertinent to this hearing on objections. The Court has before him his notes made during the course of the Corporation Counsel's argument today in support of the City's objections, namely, the Corporation Counsel seeks to have the Court particularize in detail, if you will, the manner of "in arriving at its awards." The Court deems the decision rendered by the Court on April 3, '73, to be sufficiently broad in scope and content to meet the requirements of either statutory law, or decisional law.

Nevertheless the Court recognizes the importance of this case to both the claimant and to the City and will make some observations for the guidance or enlightenment of counsel, and perhaps for their aid in the Appellate process.

The Corporation Counsel referred also to the Birchwood sale, and inquired of the Court the extent of its consideration of the Birchwood sale, whether it regarded it as more valuable or less valuable than other sales. The answer to that query by the Corporation Counsel boils down to this: The Court certainly considered the Birchwood sale, but not to the exclusion of the other sales.

The Court went all the way in considering sales proffered by both the claimant and by the City, albeit the Court has no hesitancy in declaring that none of the sales were true comparables. But the Court did consider the Birchwood sale, and did not seek to make adjustments as such with relation to the Birchwood sale, because it was not a true comparable, and I do believe that without citing chapter and verse, it is so reflected in this Court's post trial decision.

Oral Opinion of Castaldi, J.
Dated June 5, 1973

So far as adjustments are concerned that the Corporation Counsel mentioned today as to the amount of land for street use, and converting gross acreage to net acreage, this Court's decision of April 3rd, on page 20, indicates that it did consider the very proposition of converting gross acreage to net acreage. And I am not now, Mr. Freedman, passing upon the more precise issue that you raised during the argument today about the particular street in D.P. 18 and D.P.'s 22 to 26 involving the right of way. I will come to that later.

And then the Corporation Counsel asked insofar as the tip is concerned, whether the Court considered the items or issues or factors of delay in development of the tip vis-a-vis the initial project area, and the accessibility or non-accessibility of the tip as related to the initial project area, and also the amount of fill that would be required for the development of the tip as compared with the development of the initial project area.

The answer is yes, very definitely. The Court did consider those factors, among others, so far as valuing the tip is concerned. Otherwise, there would not be that substantially less value that was determined by the Court to be the fair market value of the tip as relates to the fair market value found by the Court for the initial project area.

The Corporation Counsel also asked what was the obvious, I think, because the Corporation Counsel pretty much did his own arithmetic as to the awards made by the Court for both the initial project area and the tip. And so that it will be crystal clear, as to the initial project area, which incidentally, and this is only for the record as that it will be clear upon appeal, the initial project area is also referred to as the Two Parks Area.

Oral Opinion of Castaldi, J.
Dated June 5, 1973

The Court made an award for the initial project area in the total principal amount of $16,300,000, resulting in an overall unit value of approximately $2.10 per square foot. Again arithmetically there are, according to this Court's reliance upon the statement made in the briefs or otherwise by counsel for both the claimant and for the City, the initial project area comprises a total of upland and land underwater of 7,760,122 square feet, which computed on the basis of a unit value of $2.10 per square foot results in the figure or award made by this Court of $16,300,000.

As to the tip, that comprises a total of 14,666,000 square feet, which computed at a unit value of one dollar, that comprising both upland and land underwater, the arithmetic comes out to $14,666,000 which the Court rounded out to $14,700,000 as a lump sum award for the tip again inclusive of both the upland and the land underwater.

In reflecting the overall unit valuations geared to the lump sum awards that the Court has just stated, and having been made separately for the initial project area and for the tip, the Court was mindful that the sale to the claimant, and the sale by the claimant to the cooperative was similarly on a lump sum basis without a breakdown between the upland and the land underwater.

Frankly, among other things, this Court asked himself this question before he rendered his determination as to the award for both the initial project area and the tip, and that question was this: As of the title vesting dates, what would a prudent buyer pay in an arm's length transaction for the initial project area and the tip, lock, stock and barrel, if you will, in their existing states of exploitation? Accordingly as this Court pointed out in his decision, the lump sum awards were made by way of answering the ques-

tion that the Court has just postulated. That is not to say that the Court equated the value of the land underwater with the value of the upland.

I don't mind saying again for the enlightenment of counsel that as a check on this Court's lump sum awards, and the resultant unit values, I did consider the evidence in the record relating to separate valuations for the upland and the land underwater for both the initial project area and the tip. I am mindful of the testimony of the claimant's expert, Mr. Powers, and I referred to it during the course of the Corporation Counsel's argument today that the claimant's expert, Mr. Powers, used a dual method of valuing the land under the water. One way was the ratio method by which the land underwater was valued at one-third of the value of the upland. The value of the upland in Mr. Powers' opinion was $3.75 a square foot. On his ratio method, and for the reasons as were explained by him all in the record, and mindful too that he said that the underwater land was accreting at the rate of eight acres per year, Mr. Powers reached a valuation for the underwater land of $1.25 a square foot. And then the second method that was referred to and used by Mr. Powers was to determine the present value of the prospective accretion on the basis of eight acres annually.

I know that that was the subject of conflicting opinions as to the amount of accretion. And mindful too that according to Mr. Powers, in order to reflect any diminution in the accretion rate, he, Mr. Powers, adopted a discount rate of about 50 percent higher than the ordinary rate, and on that basis Mr. Powers' figure resulted in a value of about $1.90 a square foot for the land underwater.

Oral Opinion of Castaldi, J.
Dated June 5, 1973

The Court considered all that in reaching his own valuation of both the tip and of the initial project area. In this connection the Court is mindful that there was no testimony given, no proof offered by the City of any probative value as to a separate value accorded by the City experts to the land underwater. They said in substance that they considered that the value of the land underwater was reflected in the value of the upland, but at no stage do I recall that there was any specific value that was thus accorded to the land underwater as being reflected in the value of the upland.

This Court went further. I was just curious as to a check on the award reached by this Court as to the values for the initial project area and the tip. I was mindful that in the initial project area, I am reading from my notes which are from the record, and I believe they are correct, 5,339,498 square feet of upland in the initial project area, and 2,420,624 square feet of land underwater.

Guided by the evidence in the record, by adopting Mr. Powers' testimony of valuing the land underwater on a one-third ratio value to the upland, I would have $2.65 per square foot as the value of the upland, and 90 cents per square foot as the value of the land underwater in the initial project area resulting in the figure of $16,328,230, or rounded out to $16,300,000.

I will tell you why that was particularly informative to the Court and somewhat comforting in a check on the valuations reached by the Court.

One, the valuations of course reached by the Court are in the light of all of the factors recited in this Court's post trial decision. But I could not help but also see, among the Court's copious trial notes, the fact that Mr. Tuchler, one

of the City's experts on the second trial, who was also an expert on the first trial, reflected a value of $2.75 per square foot for that land in the remainder area that was used by the claimant for the proposed construction, or construction in progress of the apartment buildings.

That appraisal of $2.75 appears in Mr. Tuchler's appraisal used upon the first trial which is labelled "remainder," in City's Exhibit 98. I wouldn't refer to that except that it was the subject also of cross examination upon the second trial, and that cross examination appears—of Mr. Tuchler—at pages 1843 and 1844 of the second trial. I am mindful of Mr. Tuchler's explanation as to his use of the $2.75 per square foot valuation. But no matter how you slice it, it seems to me that it is a rather persuasive factor that this Court's valuation of $2.65 per square foot of the upland in the initial project area being lower than the City's own figure is pretty much in line as representative of a fair valuation.

I cite that not as being either the controlling or exclusive factor at all of reaching a valuation of the initial project area, or indeed of the tip. But I refer to it simply as one of the factors that did enter into the mind of the Court in determining the ultimate award to be made here.

The Court of course is not called upon to recite chapter and verse of every testimony that he took into consideration, but I mention that because it dovetails so closely to what this Court ultimately found as being fair valuation for the land and for—for both the upland and the underwater land that is here in issue.

Some reference was made to the cost to fill and bulkheading. I would say this. Unquestionably the better approach to value in a case such as this, or in any condemna-

tion case where you have to compare raw acreage with raw acreage. When I say raw acreage, that is not to say the Court is not mindful of the state of exploitation of the Breezy Point land. But if the parties were able to compare the state of the land at Breezy Point with land in a comparable state of exploitation, the case would be free of difficulties inherent in seeking to make adjustment for fill and bulkheading. Because in such attempted adjustments you have to avoid the speculative pitfalls that the Courts refer to in cases such as the Triple Cities Shopping Center Case.

Nevertheless, as pointed out in this Court's decision after trial, it did not overlook the factor of fill and bulkheading, and particularly in that the fill and bulkheading at the tip would require a greater amount than fill at the initial project area.

I want to make one other, I think, significant observation. It is this: I sought to make a very careful analysis of the City's appraisals of the initial project area and the tip. I did, I believe, all of the requisite arithmetic in that analysis of the City's appraisals. And I found that Mr. Seltzer's valuation of the tip on an overall unit basis per square foot was about 47 percent of his overall valuation per square foot of the initial project area.

Mr. Tuchler's valuation is about 43 percent of the tip vis-a-vis the initial project area. The Court's valuation of the tip on an overall unit basis is about 47.5 percent of the valuation found by the Court for the initial project area.

So you can't get, I think, much closer than that, if you are going to use ratios based even upon the City's valuation.

In conclusion, this Court made, as previously stated to counsel, several visits to Breezy Point. One in company

with counsel prior to the commencement of the trial proper, and one that this Court did on his own. I viewed not only the land in issue, but also the surrounding area. The Court also viewed each of the sites of the comparable sales, and that is known to counsel on both sides in that that view was with Mr. Seltzer for the City and Mr. Powers for the claimant.

The views made by the Court of both Breezy Point and surrounding area and the comparable sites were of immeasurable aid in this Court's consideration of this case. I have no hesitancy in saying that in the Court's view, the comparable sites that were proffered by both sides do not measure up in value to Breezy Point.

To put it very bluntly, the Court asked itself the obvious question. As of the title vesting dates, where in the City of New York could you find land akin to Breezy Point with its ocean view for less than an overall unit price of $2.10 per square foot? This brings to mind the observation made by the Court in the matter of County of Nassau, reported at 71 Misc. 2nd 554, at page 556, that waterfront land for residential use—and here I say such as Breezy Point—unquestionably, and this is now a quote from the Court's reported opinion: "Is highly desirable and commands a substantial return in the market."

I think certainly that is the situation with Breezy Point. And perhaps the reticence, if I detect it as such, not intending to be critical, but an observation by the Court, I find one of the difficulties in this case from the viewpoint of the City is its reluctance to recognize the value of Breezy Point as land that is highly desirable and no longer obtainable in the limits of the City of New York with the possible exception of Staten Island. The Court made ex-

tensive remarks, more so than he would in the normal proceeding, but perhaps it will be of aid, let's say more particularly through the medium of appeal both for counsel and for the Appellate Courts.

So far as the objections are concerned, after careful consideration, they are overruled mindful of course that the Court has made the explanation sought by the City regarding the arithmetical unit value of both the initial project area and the tip.

That leaves open the testimony referred to by the Corporation Counsel as to D.P. 18 in the right of way, and whether the City was remiss in that connection or not. I would rather not pass on that now. Frankly, if the City is right, I will do what I think is appropriate to make the proper amendment to a decision by the Court.

I am bothered, and frankly, Mr. Freedman, that involves converting gross acreage to net acreage. That was one of the items that I did consider whether or not this particular area was among those—I don't want to say at this moment yes, I did or did not. Generally did I consider the issue of converting gross acreage to net? The answer is yes. But I will be glad to have both the Corporation Counsel and counsel for the claimant submit some memo to me on that issue, and then the only thing that will be open is that issue.

Otherwise, this is the oral decision of the Court on the hearing of objections.

Opinion of Castaldi, J.,
Dated April 3, 1973

Dated April 3, 1973

By CASTALDI, J.:

These are jointly-tried proceedings in eminent domain involving lands acquired by The City of New York. The condemned parcels of land are located in the Borough of Queens in that portion of Rockaway Peninsula, north and west of Fort Tilden, known generally as Breezy Point. The claimant-owner is Atlantic Improvement Corporation (herein referred to as "Claimant" or "Atlantic").

The Rockaway Point Boulevard proceeding includes all of the land lying generally north and west of Fort Tilden, west to approximately Beach 201st Street, excepting a tract of approximately 21 acres (herein referred to as the "Remainder") located on the westerly side of Fort Tilden. The Remainder area was not condemned.* The lands taken in the Rockaway Point Boulevard proceeding (herein referred to as the "Initial Project Area" or the "Two Parks Site") consist of approximately 122.5 acres of upland and 55.5 acres of land underwater, including foreshore. Title to the Initial Project Area vested in the City on November 22, 1963.

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*The City purchased the lands comprising the Remainder from the Claimant and agreed to pay as a basis therefor the price that is judicially determined for the lands condemned in the Rockaway Point Boulevard proceeding. The City also purchased from the Claimant for the sum of $5.6 million dollars the apartment buildings and related improvements that were in the process of construction on the Remainder area. Although not necessarily inconsistent, this payment for apartment buildings hardly seems compatible with the City's contention that the highest and best use of the Breezy Point land was for one and two-family detached houses. In any event, the court is not concerned in this proceeding with any valuation of improvements.

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The Beach 222nd Street proceeding includes all of the land lying generally west of Beach 222nd Street to the westerly end of the Rockaway Peninsula (herein referred to as the "Tip"). The Tip consists of approximately 209 acres of upland and 127.5 acres of land underwater. Also taken in this proceeding was a strip of land consisting of a road (herein referred to as the "Right of Way") extending from the westerly side of the Initial Project Area across the lands of the Breezy Point Cooperative, Inc., to the easterly side of the Tip, containing approximately 14.5 acres of land.** Title to the Tip and the Right of Way vested in the City on August 31, 1964.

The First Trial; The Decision and Appeals.

These proceedings were originally tried before Mr. Justice Groat, who awarded the Claimant $39,775,208, of which $21,296,439 was for the lands in the Initial Project Area and $18,478,769 was for the Tip area. (N. Y. L. J., June 18, 1968, p. 15, col. 6; N. Y. L. J., June 26, 1968, p. 15, col. 5.)

Upon appeal to the Appellate Division, Second Department, the determination and awards of the Special Term were affirmed without opinion (34 A. D. 2d 995).

Upon cross appeals, the Court of Appeals modified the determinations below by reversing the awards to Claimant and remitted the matter to this court "for further proceedings on the question of damages • • •" (28 N. Y. 2d 465, 473-74, mot. for rearg. den. 29 N. Y. 2d 649). Referring in particular to the principles stated in *Arlen of Nanuet v. State of New York* (26 N. Y. 2d 346, mot. for rearg. den. 27 N. Y. 2d 737; mot. for rearg. den. 27 N. Y.

**The land for the Right of Way was not valued by any of the appraisers. Similarly, this court will exclude the Right of Way for purposes of valuation.

2d 816)* the Court of Appeals held that, as applied to the lands in the subject proceedings, the "capitalization of estimated income" was an impermissible method of valuation. The court also rejected the proffered comparables in that the land in issue was "vastly larger than the land to which it was compared" and "markedly different in adjacent development". Somewhat limited guidance for counsel and the trial court was also indicated by the Court of Appeals at page 472 of its opinion:

> "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself."

Of course, the law as formulated by the Court of Appeals is the law of the case. Equally clear and no less imperative is that upon remand it becomes the duty of the trial court to make its independent factual determinations based upon a consideration of the relevant evidence. (*Gugel v. Hiscox*, 216 N. Y. 145, 152; *Ga Nun v. Palmer*, 216 N. Y. 603, 612.)

The Appraised Valuations.

Claimant's appraiser, Theodore J. Powers, values all of the land taken (Initial Project Area and the Tip), including underwater land, at $63,500,000.

Arlen of Nanuet was decided on April 16, 1970, subsequent to the decision rendered by Mr. Justice Groat upon the first trial of these proceedings.

Mac C. Seltzer, one of the City's appraisers, finds a total value of $12,510,750 for all of the condemned land. The City's other appraiser, Jacques O. Tuchler, who testified both upon the first trial and this trial, finds a total value of $11,819,000.

Just Compensation; Highest and Best Use.

It is a constitutional mandate that private property shall not be taken in eminent domain without "just compensation". (U. S. Const. 5th Amdt.; N. Y. Const., art. I, §7, subds. [a] and [b].) Broadly stated, "just compensation" means that the owner is entitled to be paid in dollars and cents the fair market value of his property as of the title vesting date. In reaching a determination of fair market value, the court must consider "the highest and best available use of the property". (*Keator v. State*, 23 N. Y. 2d 337, 339; see also *Olson v. United States*, 292 U. S. 246, 255-256; *City of New York* [*Clearview Expressway*], 9 N. Y. 2d 439, 445; *Matter of St. Agnes Cemetery v. State of New York*, 3 N. Y. 2d 37, 41; *Sparkhill Realty Corp. v. State*, 254 App. Div. 78, 82, affd. 279 N. Y. 656.)

Upon the first trial, Mr. Justice Groat found that the highest and best use of the condemned land was "for a residential community of apartment houses, garden apartments or town houses and private homes with integrated retail business facilities and with portions of the waterfront developed as a marina or such recreational facility". At the outset of this trial, counsel for the Claimant contended that best use was determined, at least implicitly, "by the unanimously affirmed finding of best use made at the prior trial". However, this court took the view that best use is a necessary element of "damages" and therefore the question should properly be considered in the light of all relevant evidence adduced upon this trial.

This view was accepted by Claimant with the observation, however, that "the finding of Judge Groat is certainly persuasive" (Claimant's Post-Trial Brief, p. 1).

Upon this trial, both the Claimant and the City are in agreement that the highest and best use is residential. However, the parties differ as to the type of a residential use. Claimant contends that the best use was "for development as a master planned community containing a homogeneous balance of multi-family high, medium and low rise apartment houses, town houses, community and recreational facilities, commercial retail areas, playgrounds, and open areas". The City asserts that the best use was "for development and improvement with one and two family houses, detached".

INITIAL PROJECT AREA

After reviewing all of the evidence, the court finds that the highest and best use of the Initial Project Area was for development as a "master planned community" encompassing an apartment complex with ancillary facilities.

Claimant's planned community was more than a "speculative or hypothetical arrangement in the mind of the claimant". (*City of New York* [*Shorefront H. S.—Rudnick*], 25 N. Y. 2d 146, 149, citing *Triple Cities Shopping Center v. State of New York*, 26 A. D. 2d 744, affd. 22 N. Y. 2d 683; see *Matter of City of New York* [*Broadway-Carey Corp.*], 40 A. D. 2d 865.) Here, Claimant had an actual ongoing plan in its early stages of development, entitled "A Program for the Development of Breezy Point". This comprehensive plan was prepared for the Claimant by a recognized firm of engineers and architects. (Claimant's Ex. 2.) Significantly, the plan was transmitted to Atlantic in April 1961, long before the title vesting dates. Admittedly, the plan treats in particular with

the Initial Project Area. That is because the Initial Project Area, as stated in the plan, was selected as the site for the initial construction.

Some of the factors found by the court in support of an apartment complex as the best use for the Initial Project Area are here summarized.

(a) *Zoning.* The land was classified in an R-4 zone, which would permit of apartment houses.

(b) *Streets.* An overall new street map with details as to all required streets for the Initial Project Area, designed for apartment house development, was prepared and submitted by the Claimant to all of the requisite City agencies.

(c) *Sewers.* A new drainage plan, including sanitary and storm sewers for the entire Initial Project Area was developed by Claimant. It appears that Claimant completed 97% of the first phase of sanitary and sewer construction in what is now referred to as the "Remainder" area.

(d) *Schools.* An agreement was reached with the City whereby provision was made for two elementary schools and one junior high school, all as shown on Claimant's Site Plan.

(e) *Fire Protection and Water System.* These two facilities were the subject of agreement with the City as part of the plan for the development of the Initial Project Area.

(f) *Other Utilities.* Full provision was made for utility services from the Long Island Lighting Company. Also, arrangements were made for the sale to the Telephone Company of a site for a telephone service building. Upon the

Mayor's announcement of his recommendation of condemnation, the sale was terminated.

(g) *Transportation.* Claimant obtained an agreement from Green Bus Lines, an intra-urban passenger carrier, indicating that "as the development progresses we stand ready to expand our services to meet the increasing transportation requirements of the area".

(h) *Community and Commercial Purposes.* As part of its "master planned community", in 1961 Claimant sold a site to the United Lutheran Synod of New York for church purposes. For its shopping center, Claimant entered into leases with Waldbaums and five other store tenants. Realistically, the leases were vitiated because of the cessation of construction of the apartment houses on the Remainder area in view of the impending condemnation.

(i) *Actual Construction.* As pointed out by the City, it is true that the actual construction of the apartment buildings and other improvements were made by the Claimant in the Remainder area. However, Claimant had to start somewhere with the actual construction phase of its program for development of the Initial Project Area. Claimant elected to commence construction in the Remainder area. In choosing not to condemn the Remainder area, the condemnor may not penalize the Claimant by selective condemnation.

(j) *Economic Use.* The City urges that Claimant has not submitted any demonstrable proof that there would be a demand for rental of apartments at Breezy Point. Of course, the asserted proposition does not permit of an answer with

> mathematical precision. However, from all of the evidence, this much is clear. Since the end of World War II and continuing through the 1960s, Queens County has become more and more a borough of apartment house dwellers and this extends to the outlying areas of the county. Also, despite the increase in the number of apartments, the number of vacancies in Queens has been declining at a faster rate than in the rest of the City. This is understandable in the light of the ever-increasing shift in population to all parts of the Borough of Queens.

To the foregoing, it may be noted that responsible business and financial institutions loaned money, purchased stock and entered into leases with the Claimant, on the basis of its planned development of the Initial Project Area, with construction in the Remainder as the first phase of the development. Surely, this evidence may not be ignored in any consideration of highest and best use.

The determination of highest and best use is a fact finding process coupled to a large degree with a sense of judgment by the court. No single factor is conclusive. The relevant evidence must be considered in its totality. So considered, this court concludes that the best use for the Initial Project Area was a "master planned community" with apartment houses and ancillary facilities.

THE TIP

As with the Initial Project Area, Claimant contends that the Tip may be best utilized for apartment houses as part of its "master planned community". The City asserts that the highest and best use of the Tip is for one and two-family, detached houses, being the same use that the City applied to the Initial Project Area.

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Claimant insists, and not without some support in the record, that the overall plan for the development of Breezy Point as a community was to proceed with the Initial Project Area as the first phase of construction, and to follow similarly with the construction of the Tip. See, for example, Claimant's expressed intention "to develop and improve all of its property and to construct urban residential communities thereon • • • commencing with its Initial Project Area". (City's Ex. 26, pp. 3 and 4.) In similar vein, see the report entitled "Program for the Development of Breezy Point" wherein reference is made to "comprehensive investigations and studies for the preparation of a master plan for the development of the entire area of Breezy Point as a self-contained residential community and to prepare a detailed site plan for initial construction of a portion of the area". (Claimant's Ex. 2, p. 1.) Also, much of what this court said in support of its conclusion that the highest and best use for the Initial Project Area was an apartment complex applies no less to the Tip.

Upon a realistic consideration of all of the relevant evidence, this court finds and ascribes to the Tip a highest and best use as an apartment complex akin to the best use for the Initial Project Area. However, the utilization of the Tip for its best use is not immediate. That factor is considered by the court in its valuation of the Tip.

COMPARABLE SALES

In order to better understand the evidence, the court not only made the statutory view of the subject property but also viewed the entire peninsula at Breezy Point and the site of each comparable sale proffered by the parties.

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Claimant's Comparable Sales.

With commendable candor, counsel for Claimant acknowledge in their post-trial brief (p. 2) that "none of the comparables are exact comparables". The court agrees. However, one of the Claimant's sales (Q-1, known as "Birchwood"), discussed separately, has sufficient attributes of comparability to warrant the court's consideration. As to size, all of the Claimant's sales, excepting Birchwood (52.590 acres), are vastly smaller as compared with the land in issue. Sale Q-2, adjoining the property of sale Q-1, has an acreage of 6.118 acres. Sales SI 1-A and 1-B, being two sales from different grantors at different times to the same grantee, have a combined acreage of 9.565 acres. Claimant's other comparable sales range in size from 1.162 acres to less than 5 acres. It is therefore evident that, excepting sale Q-1, all of Claimant's sales run afoul of the admonition by the Court of Appeals that true comparables may not be vastly different in size from the land in issue.

In support of its valuation, Claimant regards sale Q-1 (Birchwood) as "the closest comparable". Birchwood consisted of approximately 52 acres of unimproved land located in the northeast section of Queens, known as the Bayside-Clearview area. In April 1965 the property was sold for $6,250,000 or $2.73 a square foot. The land was subsequently developed as a complex of high and low rise apartment buildings. Claimant asserts that Birchwood is strikingly comparable to Breezy Point minus ocean, beach and broad bay frontage. The City contends that Birchwood was in a fully populated residential center similar to those properties which the Court of Appeals held impermissible as comparables upon the first trial. Mindful that the area must be considered as of the time of sale in 1965, this court finds that the infirmity asserted by the City does not attach to Birchwood. The City's expert, Seltzer, testified that Birchwood was in

close proximity to several parkways and also close to the Bronx-Whitestone Bridge and the Throgs Neck Bridge. Seltzer further testified that the Birchwood area had a development of apartment houses with a shopping center, schools and other community facilities. Claimant's expert, Powers, testified that "mass transportation was limited to the Q13 bus on Bell Boulevard" which connects with the IRT subway terminal in Flushing.

Although Birchwood is not a true comparable, the court finds that of all the sales, it is in fact the "closest comparable". Birchwood was a large tract of vacant land on the periphery of the City, for use as an apartment complex with features of some similarity to Breezy Point. As such, Birchwood offers some aid or indicia in determining market value of the condemned properties.

The City's Sales.

(1)

In considering the City's sales, the court is aided by Claimant's withdrawal of "all objections and motions reserved at the trial to the receipt of evidence offered by the City". (Claimant's Post-Trial Brief, p. 4.) Of course, the evidence encompasses the City's appraisals and the sales noticed therein. Consistent with the court's approach to the Claimant's sales, the court's consideration of the City's sales is limited to those sales that are not vastly different in size from the land in issue.

City Sales 4 through 10 (Mill Basin). These sales are considered together because they involve contiguous property located in Mill Basin in the Avenue U section of Brooklyn. All sales were made between 1959 and 1961.*

*It appears that there were three resales in 1963 and 1964 of small portions of the Mill Basin property at higher prices. (See Claimant's Ex. 219.)

Sale 4 consisted of approximately 21 acres (unfilled land) and sold for an unadjusted price per square foot of 19 cents. Sale 5 consisted of approximately 22 acres (unfilled land) at an unadjusted unit price of 17 cents per square foot. Each of the other sales was from about two to five acres in size. The unadjusted unit prices of the other sales (filled land) ranged from a low of $1 to $1.69 per square foot with sale 9 having an unadjusted price of $2.10 per square foot. Some of the sales were inland properties and some were waterfront plots. Seltzer gave the "greatest weight" to the Mill Basin sales in his valuation of the Initial Project Area.

City Sale 11 (Twin Pines). This sale in December 1963 consisted of 134 acres. The unadjusted sales price was $1.37 per square foot. At the time of the sale, the property was zoned R-3 (one and two-family houses). The Twin Pines tract was closer to adjacent development but was relatively inaccessible except for its proximity to Shore Parkway which separated the land from Jamaica Bay. No beach or bathing facilities were available.

Four years later (December 1967) there was a sale of the Twin Pines property for a Mitchell-Lama development, at $2.10 per square foot. (Claimant's Sale ML-1.)**

City Sale 12 (Co-Op City). This was a sale in July 1965 consisting of 301 acres of largely marsh land used for a Mitchell-Lama development in the northeast section of the Bronx. The property was with limited amenities at the time of the sale. "Water orientation" consisted of frontage of some of the property on Hutchinson River.

**In what might be interpreted as a recognition of the difficulty in establishing valuation, counsel for both sides consented to have the court consider Mitchell-Lama sales. (But see *Matter of City of New York [Shorefront H.S.-Rudnick]*, 25 N. Y. 2d 149.)

There was no beach and the river could not be used for bathing. Although the sale was at least a distress sale if not a forced sale, the unadjusted price per square foot was $1.22.

City Sale 3 (Public Place). This was a sale in 1959 of 108 acres located in an area known as Public Place, south of Rosedale and near the Kennedy Airport. The sales price was 50 cents per square foot. Apart from size (108 acres) the property is devoid of any similarity to Breezy Point.

City Sale 14 (Staten Island South Shore Golf Course). This was a sale in 1963 of a golf course consisting of 216 acres at a unit price of 31 cents per square foot. What was said as to City Sale 3 applies no less to this sale. Apart from size (216 acres) the property has no amenities similar to Breezy Point. The property is located in close proximity to the industrial area of Staten Island, across the Arthur Kill from the industrial area of New Jersey.

City Sales 15-37 (Nassau County). These sales, between 1959 and 1966, involve properties in the communities of Baldwin, Merrick, Bellmore and Lido Beach. The acreage of the parcels ranges from 10 acres (Sale 25) to 133 acres (Sale 17). The unadjusted sales price varies from 15 cents per square foot (Sale 19) to 88 cents per square foot (Sale 36). Apart from differences in size (as to some parcels), zoning and amenities, properties for residential use in Nassau County present an entirely different sellers' and buyers' market than residential properties in New York City. This alone makes it impractical to consider Nassau County sales as comparables.

From a consideration of the City's sales, this much is clear. As with the Claimant's sales, none of the City's sales is an "exact" comparable. Nevertheless, under the vexing circumstances of this case, some of the City's

sales above indicated offer at least a vestige of value as related to Breezy Point.

(2)

There remain for consideration (1) the original sale in 1960 of the entire Breezy Point acreage to Claimant's predecessor for the contract price of $17.5 million, and (2) the sale by assignment from Claimant to the Breezy Point Cooperative of 415 acres of the same lands in their existing state and use for $12 million.

Claimant contends that both sales are in the nature of "forced" sales because each sale has the element of compulsion. Claimant points to such factors in the original sale as the indicated need or desire of the sellers to sell quickly on all cash terms, the refusal of the sellers to make any representations as to the rights of the tenant leaseholders, and the unlikelihood of any purchaser being able to develop Breezy Point because the property was encumbered with ground leases to over 3,000 bungalow owners. Further, Claimant cites the varied militant activities of the organized bungalow owners that induced the sale to the Cooperative and posed a real threat to Claimant's plan for development of Breezy Point. Although these factors were urged at some length by Claimant in its brief as appellant (pp. 26-28) in the Court of Appeals, that court nevertheless suggested that "some consideration" should be given to the subject sales and the purchase price paid by Claimant. Accordingly, this court has considered all of the facts and circumstances attendant the two sales involving Breezy Point. In the main, the proof consists of the testimony given by John E. Marqusee, the Claimant's president, the testimony of W. James MacIntosh, the attorney for the original sellers-owners of Breezy Point, and the testimony of Alexander Greeley, a co-chairman of the Joint-Action

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Committee formed by the tenants-owners of the bungalows at Breezy Point. The court further considered the testimony of Powers, Claimant's expert upon this trial, and particularly Powers' comments under "Sales of the Subject Property." (Claimant's Ex. 202, pp. 63-68.)

A forced sale has been defined as a transaction "where there is an element of compulsion either on the part of the seller who is obligated to act with undue haste, thereby affording him an inadequate period in which to effect a reasonable deal, or on the part of the purchaser, who for purely personal reasons or necessities is compelled to pay a higher price than an ordinary purchaser would be willing to pay." (4 Nichols, Eminent Domain [3rd ed.], §12.3113; see also *Matter of Board of Water Supply of the City of New York*, 277 N. Y. 452.)

Both on the law and the facts, the court finds that the sale by assignment from Claimant to the Cooperative was indeed a forced sale. The record abounds with evidence that Claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms. The alternative was certain litigation that might well nigh have frustrated Claimant's plans for the development of Breezy Point.

Upon a consideration of the terms, circumstances and background of the original sale, the court is persuaded that the sale is something less than a normal market sale. The court finds, however, that the transaction was at arms' length and may be so considered. The court is mindful of the general rule of law that a recent sale of the subject property at arms' length is the best evidence of value unless explained away. (*Matter of Lane Bryant v. Tax Commission*, 21 A. D. 2d 669-670, affd. 19 N. Y. 2d 715; see also *Ryan v. State of New York*, 39 A. D. 2d 830; *Vasile v. State of New York*, 30 A. D. 2d 1042, affd. 24 N. Y. 2d 969.) In language that is particularly apt here, the Supreme Court of the United

States said in *Olson v. United States* (292 U. S. 246, 256):

> "He [the owner] may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him • • •. The public may not by any means confiscate the benefits, or be required to bear the burden of the owner's bargain. • • • He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitution."

In other words, "original cost" or "purchase price" and "value" are not synonymous. (See *United States v. Toronto,* 338 U. S. 396, 403; *United States v. Miller,* 317 U. S. 369; *Lane Bryant v. Tax Commission, supra;* see also *Brighton Plaza, Inc. v. State,* 32 Misc. 2d 266, 271, which reflects a factual pattern quite parallel to the case at bar.) Here, in the light of the overall proof, the court finds that the purchase price ($17.5 million) does not reflect the true or actual value of the property.

THE COURT'S VALUATION

In summary, this is the situation before the court. The total valuations of the experts are:

Claimant (Powers)	$63,500,000
City (Seltzer)	$12,510,750
City (Tuchler)	$11,819,000

To say that there is a gross disparity between the valuations of the Claimant and the City is an obvious understatement.

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The best use found by the court for the Initial Project Area and the Tip is an apartment complex, as zoned.

Both the Claimant and the City use purported comparable sales of vacant land as the sole basis for valuation. However, none of the sales offered by either side is an "exact" comparable.

Normally, the court would be inclined to reject all of the appraisals with a direction that the valuations of the experts be geared to sales that are in fact comparable. (See *Art-Craft Realty Corp. v. State of New York*, 72 Misc. 2d 452.) However, it would be pointless to do so in this case. The court is satisfied that the Claimant and the City have diligently exhausted and submitted all sales that might be of some aid to the court. Indeed, in their post-trial supplementary briefs, following a post-trial conference held on February 8, 1973, all counsel acknowledge, in effect, that there are no additional sales or further factual evidence available on the issue of quantum.

Stated in capsule fashion, this is a case "where there are no appropriate comparable sales, where the land is vacant and unproductive and there is no income to capitalize, where the actual purchase price and the assessed valuation may not furnish a true guide to value". (*Yennock v. State of New York*, 23 A. D. 2d 809, 810.)

In its quest for "just compensation" the court considered all of the evidence including the purchase price paid by Claimant and all sales with particular relation to the Birchwood sale that would afford "a glimmering of the path to the market place."* Also considered was

*See *In re City of New York [Boston-Secor Houses-Rusciano]*, N.Y.L.J., Jan. 21, 1965, p. 16, col. 2 [Sup. Ct., Bronx Co.], revd. 28 A. D. 2d 658, revd. 25 N. Y. 2d 430, wherein the trial court was confronted with factual circumstances not unlike those in the case before this court.

the extensive testimony given by the experts relating to a myriad of so-called "adjustments" including but not limited to factors such as time, location, waterfront view, zoning, topography, soil conditions, size of the parcels, and conversion from gross acreage into net acreage. Seemingly, the proof was offered by the parties in purported observance of the holding in *Latham Holding Co. v. State of New York* (16 N. Y. 2d 41, 45), as to the need for adjusting conditions between comparable sales and the subject property. Although this court considered all of the more important factors or conditions, they cannot be adjusted with any degree of mathematical precision because the proffered comparables are not true comparables. For the court to indulge in arithmetical or percentage adjustments would be a sham. In reaching its overall valuation, the court also considered the proof relating to existing land underwater, and accretion. as well as the probability of claimant's purchasing additional land underwater. (See *Matter of City of New York* [*Public Place*], n.o.r. N.Y.L.J., Feb. 4, 1972, p. 9, col. 5.) As reflected in the following colloquy, the court was also mindful of the state of exploitation and development of the condemned land as a pivotal factor from the standpoint of valuation (SM 59-60):

[Witness, Powers]:

"I think that a prospective purchaser, approaching and examining this property as of the vesting date, would certainly take into consideration all of the planning, all of the construction, all of the groundwork, the engineering that had gone into it, and would certainly consider it when estimating in his mind what the value of this property was.

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[The Court]:

"May I put it this way, Mr. Witness, that you say the state of exploitation, if you will, of the subject property, might well be a factor to be taken into consideration by a prospective purchaser?

• • •

"A. Yes • • •."

After a painstaking consideration of the mass of evidence,* the court finds that the fair market value, as of the title vesting dates, of all of the condemned lands is $31,000,000.

Although tried jointly, these are separate proceedings with different title vesting dates, requiring separate awards for the Initial Project Area and the Tip.

The City's experts valued the Initial Project Area and the Tip, separately, as follows:

Seltzer	
I.P.A.	$6,589,900
Tip	$5,920,850
Tuchler	
I.P.A.	$6,544,001
Tip	$5,275,005

*The considered evidence comprises in excess of 2000 pages of testimony augmented by over 1000 pages of stipulated testimony given at the first trial. There were 113 Claimant exhibits and 97 City exhibits, replete with maps, charts and photographs. Additionally, there were the appraisal reports by each of the experts. It is difficult to conceive of a condemnation case more thoroughly or more ably prepared and tried. The court's task was lessened by the cooperation it received from all of the attorneys before, during and after the trial. The court was also aided by the many briefs submitted by counsel on the various issues involved in the trial of these proceedings. For all of this, the court expresses its appreciation.

Opinion of Castaldi, J., Dated April 3, 1973

Claimant's expert, Powers, ascribes the same unit valuation of $2.83 per square foot for the Tip as he does for the Initial Project Area, resulting in the previously-stated overall valuation of $63.5 million. There is no question that the Tip area has a substantially lesser value than the Initial Project Area. It is evident from the proof, and the court so finds, that the Tip, as compared with the Initial Project Area, would require a much greater amount of preparatory site work, such as fill and bulkheading. Also, construction on the Tip in furtherance of the planned community development for Breezy Point would not commence for at least four to ten years after the start of construction on the Initial Project Area. Claimant recognizes that there should properly be a discount in the valuation of the Tip because of the indicated deferred utilization of that land. However, Claimant is of the view that any proposed discount would be commensurate with a progressive increase in the value of the Tip. The court does not adopt the equation suggested by the Claimant. Nevertheless, the discount factor has been considered by the court, together with all of the other proof in the case.

Having considered all of the evidence and mindful of the factors as related separately to the Initial Project Area and the Tip, the court makes these awards, as of the title vesting dates:

Initial Project Area:	$16,300,000	(Approximate Unit Value—$2.10 per square foot)
Tip:	$14,700,000	(Approximate Unit Value—$1.00 per square foot)

The valuations, in the view of this court, are "within the compass of relevant proof". (*Matter of City of New York* [*Coogan*], 20 N. Y. 2d 618, 625.) The court does

Opinion of Castaldi, J., Dated April 3, 1973

not profess, however, that the valuations were reached with "mathematical exactitude". In language that is compellingly applicable here, the trial court said in *Matter of Port Authority Trans-Hudson Corp.* (52 Misc. 2d 943, 945-946, mod. 27 A. D. 2d 32, mod. 20 N. Y. 2d 457, mot. to amend remittitur granted 20 N. Y. 2d 968, cert. den. 390 U. S. 1002): "No one can hope to find here the factors necessary for reaching some degree of mathematical exactitude in the ascertainment of just compensation" and "all that can be expected is the attainment of substantial justice". In the same case (20 N. Y. 2d 457, 468), the Court of Appeals observed that when the market value is too difficult to find, the court may apply standards other than a rigid rule for determining what is just compensation. In two cases decided as recently as January 16, 1973, the United States Supreme Court put it this way: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness • • • as it does from technical concepts of property law". (*Aloma Farmers Elevator and Warehouse Company v. United States,* U. S. , 35 L. Ed. 2d 1, 10; *United States v. Fuller,* U. S. , 35 L. Ed. 2d 16, 20.) The principles just stated have guided this court in making his determinations.

The Corporation Counsel is directed to submit the appropriate decree in accordance with the foregoing.

M. A. C.
J. S. C.

Opinion of the Court of Appeals
Dated June 9, 1971

In the Matter of the City of New York, Respondent-Appellant, Relative to Acquiring Title to Real Property on the Lines of Rockaway Point Boulevard and Other Streets in the Borough of Queens.

In the Matter of the City of New York, Respondent-Appellant, Relative to Acquiring Title to Real Property on the Lines of Beach 222nd Street, Queens and Other Streets in the Borough of Queens. Atlantic Improvement Corporation, Appellant-Respondent.

Argued February 17, 1971; decided June 9, 1971.

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered June 22, 1970, which unanimously affirmed decrees of the Supreme Court at Special Term (William B. Groat, J.), entered in Queens County, making awards in proceedings by the City of New York to acquire real property for park and street purposes.

Per Curiam. The award of $39,775,208 to claimant for condemnation in 1963 and 1964 by the City of New York of unimproved land in the Breezy Point section of Rockaway peninsula was over seven times the amount the same land in the substantially same condition of improvement had cost claimant three years before in 1960.

The court at Special Term expressly based its award both on "capitalization of estimated income" in projects which claimant proposed to develop but which had not been started or contracted for in the land under consideration on this appeal; and also on "comparable sales".

Opinion of the Court of Appeals Dated June 9, 1971

Since the award was stated in two lump sums, reflecting two physical divisions of the property but not otherwise broken down, it is not possible in reviewing the record to determine to what extent the award was attributed to capitalization of income for projected future development and what extent to sales of comparable properties. But neither theory as developed on the trial will support the award and there must be a new trial.

Although a small portion of claimant's extensive projected plans for the development of its property had been set in motion and construction had begun when condemnation commenced, the city by agreement has paid claimant $5.6 million for the construction costs and agreed to pay it for the 21-acre site of construction on the basis of the acreage award that will be made in this proceeding. This 21-acre section and its improvements were excluded from the condemnation.

The land actually condemned, approximately 122 acres of the "Twin Parks" site and 209 acres of the "tip" site at the end of the peninsula, was unimproved. Plans in considerable detail for a residential apartment development of the "Twin Parks" area had been projected, but no part of the work had been contracted for or started. The proposed development of the "tip" was a plan without detail and this part of the property, low-lying and exposed to strong tidal and wind action, would have required extensive fill to be usable for any residential development. Full utilization of the "Twin Parks" area, as projected, depended in turn on acquisition of additional land from the city under Jamaica Bay and its being filled to usable levels.

The record thus was not in condition to find damages based on "capitalization of estimated income" on these projected future developments. Elaborate forecasts of income from nonexistent structures on land which needed large physical change to be usable for the purpose is not a proper measure of fair market value.

Opinion of the Court of Appeals Dated June 9, 1971

This reflects a settled principle reiterated in *Arlen of Nanuet* v. *State of New York* (26 N Y 2d 346) where the question posed was "whether it is permissible to fix the market value of land, completely bare when condemned, solely on the basis of capitalization of income expected to be realized from buildings and other extensive improvements not yet financed, on which no work had even been begun on the day of taking" (p. 351). That question was answered in the negative.

It was noted that "No shopping center was appropriated by the State. The vacant lot which it took was not a shopping center and, certainly, the agreements among financially responsible people about what they planned to do in the future with that lot did not transform it into one" (pp. 355–356).

On the capitalization of income based on future projections of unstarted plans, *Nanuet* is indistinguishable from the present case. The court in *Nanuet* on analysis of *Levin* v. *State of New York* (13 N Y 2d 87) found *Levin* was consistent with the rule laid down in *Nanuet* (26 N Y 2d, at pp. 352–353; see, also, *City of New York* [*Shorefront High School—Rudnick*], 25 N Y 2d 146, 149; *Triple Cities Shopping Center* v. *State of New York*, 26 A D 2d 744, affd. 22 N Y 2d 683).

Nor does the proof of sales of comparable parcels meet the need in this case to support the award of $39 million by competent and sufficient evidence. The parcels used for comparison were so different from the land in issue as to throw no helpful light on the fair market value of the land condemned.

The land in issue was not only vastly larger than the land to which it was compared, and markedly different in adjacent development, but its physical location on the Rockaway peninsula differed radically.

Indeed the only directly comparable property suggested by the record was the sale of 415 acres of contiguous land by claimant's predecessor, controlled by the same interests which control claimant, in 1960 for $11.9 million. This land and the acreage involved in this proceeding was purchased in 1960, for a total of $17.5 million for 785 acres. The net cost to the claimant of the remaining land now condemned, therefore, was about $5.5 million.

The evidence of comparables is tainted with the same legal error that makes the capitalization projections unacceptable. The city correctly contends that it was error of law to receive at the trial evidence of 51 sales of parcels in long-established, densely populated residential centers in Brooklyn and Queens; error, because the subject property was raw, vacant land in a remote inaccessible, undeveloped area.

Indeed this was conceded in principle by claimant's chief witness Wittman who on examination by the Trial Judge testified he could not find anything reasonably similar in the metropolitan area and, therefore, he converted the subject land into comparability with 51 sales of land which had been utilized for middle-rise and high-rise apartment houses located in fully populated and long-established residential centers.

He testified: "I can't compare an incomparable. It is impossible to make a comparison of a built up area to Breezy Point without considering it being built up and then deducting the cost." Since there was nothing similar in size in the area, the witness noted he did the "next best thing" to find available sales "that I could make adjustments to", to find the indicated value of the land.

What Mr. Wittman was saying was, of course, that if he had not used the capitalization projections at Breezy Point, he would not have been able to point to the sites of developments used as comparables. In short, the predicate of claimant's case on comparables was the capitalization projections and, therefore, claimant's case on comparables falls, as a matter of law, in the same way as the valuations based directly on capitalization.

Essentially, therefore, the claimant's proof of comparable sales was dependent on acceptance of income capitalization in different terms. The theory essentially depended on the projected completion of claimant's entire future plan at a cost for construction alone of $275 million and on comparison of this projection with the other sample properties that had been completed.

The general rule as to comparable sales is that they must relate to property in the vicinity "*similar* to the property taken" (*St. Agnes Cemetery* v. *State of New York*, 3 N Y 2d 37, 44) and an erroneous theory of valuation presents a question of law (*Latham Holding Co.* v. *State of New York*, 16 N Y 2d 41, 44).

It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects. Some consideration should be given to the sale of the large acreage of contiguous land by claimant's predecessor a few years before condemnation as well as the price paid by claimant for the land itself.

On the city's further contention that it had title derived from the State of New York to the foreshore area between mean high tide and mean low tide, claimant has been correctly held at Special Term to be the owner.

The statute (L. 1923, ch. 476) under which the city claims title contained a condition that acquisition of title depended on the city's laying out beach lines. This was not done, and the statute was repealed (L. 1937, ch. 929). This prevented the city from later acquiring title by laying out beach lines.

In 1948 the State granted to the Rockaway Point Development Corporation, claimant's predecessor in title, land which had accreted since 1930, including the present " tip ". This was in settlement of litigation to which the city was a party; and in 1962 the State made a further grant to claimant of the land which had accreted since 1948 and of the submerged land that would accrete for the next 20 years. Thus, if the State had not lost its title to land under water by the 1923 statute, claimant has become vested with the State's interest in the land under water and the accretions to it which the city now claims.

Besides this it seems evident that the State's interest before 1923 had passed to the predecessors in title of claimant and that the State had no remaining right then to convey to the city. In 1887 the State had conveyed to Henry Y. Attrill all its right and interest in land then known as Rockaway Beach. Attrill is a predecessor in title to claimant. The city argues that this release did not cover the foreshore because it was in terms stated that the land release was " bound • • • by " the ocean and other public waters and this term usually conveys only to the high-water mark.

Whatever may be the usual effect of such a term, it has been adjudicated in litigation between claimant's predecessor and the State, in which the city also was a party, that the statutory release to Attrill of 1887 included the foreshore (*Rockaway Pacific Corp.* v. *State of New York*, 122 Misc. 503, affd. 214 App. Div. 843, affd. 243 N. Y. 556 [1926]). Since the city was also a claimant in the proceeding it would be bound by that determination, but in any case it was a determination which bound the State upon whose title both the city and claimant rest and thus the city would be collaterally estopped.

Opinion of the Court of Appeals Dated June 9, 1971

The order should be modified, without costs, by reversing the award to claimant and the matter remitted to the Supreme Court, Queens County, for further proceedings on the question of damages in accordance with this opinion and, as modified, affirmed, without costs.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON concur in *Per Curiam* opinion.

Ordered accordingly.

SAME TITLE

Motion for Reargument denied.

July 7, 1971

Opinion of Appellate Division
Dated June 22, 1970

1602 E, 1602 AE

In the Matter of

THE CITY OF NEW YORK (Rockaway Point Blvd., etc., Queens; Index No. 13004-1963).

In the Matter of

THE CITY OF NEW YORK (Beach 222nd Street, etc., Queens; Index No. 7324-1964).

ATLANTIC IMPROVEMENT CORPORATION (DP 1-16 incl., 16A, 16B, 18, 19, 20, 22-34 incl.),

Claimant-Appellant-Respondent,

CITY OF NEW YORK,

Appellant-Respondent.

Two first separate and partial final decrees of the Supreme Court, County of Queens, both dated February 14, 1969, one as to damage parcels 1 to 16, inclusive, 16A, 16B, 18, 19 and 20, and the other as to damage parcels 22 to 34, inclusive, affirmed insofar as appealed from, without costs.

In affirming the above decrees we are not unmindful of the recent decision by the Court of Appeals in Matter of the City of New York (Manhattan Civic Center Area—Boehm; Duane Reade Corp.) (— N Y 2d — [dec. May 14, 1970], affg. 32 A D 2d 530), which by its affirmance, determined the interest rate in situations comparable to the one at bar to be 6% beginning August 1, 1966. In this respect

Opinion of Appellate Division
Dated June 22, 1971

we note that in the instant proceedings Special Term, by its decision dated January 27, 1969, stated that, in view of the cases now on appeal on the question of the maximum rate of interest, the final decree "shall not prejudice the claimant seeking a modification thereof in the event that the appellate courts should allow interest at a rate in excess of that presently permissible." Absent an express provision for interest in the decrees presently before us and absent a request in the briefs for a modification of the decrees so as to include permissible interest, the parties are relegated to seeking such modification with respect to interest as they may be advised.

RABIN, *Acting P.J.*, HOPKINS, MARTUSCELLO and BRENNAN, concur.

(BELDOCK, *P.J.*, deceased)

June 22, 1970

CITY OF N. Y. (ROCKAWAY POINT BLVD.)
1602E, 1602AE

Opinions of the Supreme Court of the State of New York, Groat, J.

SUPREME COURT:

QUEENS COUNTY,

Special Term For Condemnation Proceedings.

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title in the real property where not heretofore acquired, for the same purpose, for park and street purposes to

ALL those certain lots, pieces or parcels of land together with any improvements erected thereon, situate, lying and being in the Borough and County of Queens, City and State of New York within (1) the lines of Rockaway Point Boulevard from Beach 184th Street to Beach 201st, (2) the park bounded generally by Rockaway Point Boulevard, Beach 201st Street. Rockaway Inlet (Jamaica Bay), Bayside Drive and Beach 184th Street, and (3) the park bounded generally by Rockaway Point Boulevard, Beach 193rd Street. Fort Tilden, the Atlantic Ocean and Beach 201st Street, etc. in the Borough of Queens, City of New York.

Index #13004-63

Opinions of the Supreme Court of the State of New York, Groat, J.

In the Matter

of

The Application of The City of New York, relative to acquiring title in the real property where not heretofore acquired, for the same purpose, for park and street purposes to

All those certain lots, pieces or parcels of ground, together with any improvements erected thereon, situate, lying and being in the Borough and County of Queens, City and State of New York, within (1) the lines of a park bounded generally by the westerly line of Beach 222nd Street and its prolongations, Rockaway Inlet and the Atlantic Ocean as said is laid out on a map approved by the Board of Estimate on April 23, 1964, (Calendar 271), and within (2) the bed of Rockaway Point Boulevard from Beach 201st Street to Beach 222nd Street, etc. in the Borough of Queens, City of New York.

Index #7324/64

Supplemental Opinion of Groat, J.,
Dated June 24, 1968

Dated: June 24, 1968

By: GROAT, J.

In a previous memorandum dated June 13, 1968, the Court awarded claimant the sum of $39,775,208.00 in this condemnation proceeding, in addition to the sum of $4,000,000.00 awarded during trial for trade fixtures and other items set forth in said memorandum.

The award of $39,775,208.00 is made applicable to the two portions condemned by separate orders of condemnation, as follows:

"Two Parks" Area—$21,296,439.00
Tip Area —$18,478,769.00

The Corporation Counsel is directed to prepare and submit the first, separate and partial tenative decree.

W. B. G.
J. S. C.

Opinion of Groat, J., Dated June 13, 1968

Dated: June 13, 1968

By: GROAT, J.

These are jointly-tried proceedings in eminent domain instituted by the City of New York relative to acquiring title to certain tracts of land for park purposes on the western tip of the Rockaway Peninsula in the Borough of Queens, City of New York, and known generally as "Breezy Point". The trial of this matter encompassed some 25 days.

In January, 1961, the Rockaway Point Development Corporation conveyed a tract of land extending from the north and west of Fort Tilden west to the tip of the Rockaway Peninsula, consisting of more than 800 acres, to the claimant and Breezy Point Cooperative, Inc. The Cooperative took title to a section located approximately between Beach 201st Street and Beach 222nd Street and to Roxbury, a section of about 45 acres, in the northeast end of the tract. Title to the balance, including the tip and the interior section located between Beach 201st Street and Fort Tilden, was deeded to the claimant.

By an order of this court dated November 22, 1963, title to most of the interior section (hereinafter referred to as the "Two Parks area") vested in the City. An L-shaped portion of the interior section, consisting of about 20 acres and located on the west side of Fort Tilden, was not included in the November 22nd order of condemnation and, therefore, it is not included in this proceeding.

Title to the tip vested by an order of condemnation dated August 28, 1964.

Opinion of Groat, J., Dated June 13, 1968

The City has contended that it had title to the foreshore prior to condemnation. This contention was the subject of an application to this court in the latter part of 1966. Mr. Justice Conroy, in a long and well-reasoned opinion dated December 2, 1966, denied the City's application and, therefore, the foreshore area is considered in determining the value of the taken land.

The value of the land must be determined in relation to the highest and best use to which claimant might reasonably put it. (*Matter of City of New York [Clearview Expressway]*, 9 N. Y. 2d 439, 445; *St. Agnes Cemetery v. State of New York*, 3 N. Y. 2d 37, 41.) Upon the evidence presented, claimant's planned use of the land as a residential community does not appear unreasonable. (Cf. *United States v. 25,406 Acres of Land*, 172 F. 2d 990.) Wherefore, the court finds that the highest and best use thereof was for a residential community of apartment houses, garden apartments or town houses and private homes with integrated retail business facilities and with portions of the waterfront developed as a marina or such recreational facility.

During the trial of this proceeding, the court, by oral decision, determined the value of all the buildings, machinery, trade fixtures and other items set forth in claimant's exhibits 96 and 97 and the sewerage system as set forth in claimant's exhibit 98 and awarded $2,800,000.00 for such property in the Two Parks area and $1,200,000.00 for such property in the tip area.

The court has reviewed the record, including the appraisals, and has considered the evidence in light of both comparable sales and capitalization of estimated income (see *Levin v. State of New York*, 13 N. Y. 2d 87), being cognizant of the limitations of both systems of real estate appraisal as applied to the realty in question (*Latham Holding Co. v. State of New York*, 16 N. Y. 2d 41; *Levin v. State of New York, supra*), and, having made the statutory view, makes the following award: $39,775,208.00.

The Corporation Counsel is directed to prepare and submit the first, separate and partial tentative decree.

W. B. G.
J. S. C.

(Seal.)

Supreme Court, U. S.
FILED
OCT 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The decision of the New York Court of Appeals was rendered and the remittitur of the court issued on June 10, 1976 (A.1a). Petitioner's motion to amend the remittitur was withdrawn September 3, 1976 (Mo. No. 672-Mtr. of City of N.Y. [Alantic Imp. Corp.],- NY 2d -). The petition for a writ of certiorari was filed September 7, 1976.

Question Presented

This Court having held, in the very case cited by petitioner as authority for review of State court awards, that "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right" (McCoy v. Union Elevated R. R. Co., 247 U.S. 354 363 [1918]; Pet., pp. 19-20), has any fundamental right been denied a condemnee who, on each of two trials, presents valuation evidence generally regarded as too speculative to provide a basis for award, and is ultimately awarded several times the price he had paid for the property three years

prior to condemnation?

Statement of the Case

In 1960, petitioner's parent company contracted to purchase 785 acres of land at the westerly end of the Rockaway Peninsula in Queens County bounded by the Atlantic Ocean and Jamaica Bay (hereinafter Breezy Point) for $17.5 million, or approximately $22,000 per acre (A.55a). The land was then occupied, on 10-year leases, by about 3,000 bungalow owners in two summer bungalow colonies, one on the central portion thereof (370 acres) and the other at its easterly end (45 acres) adjoining Fort Tilden; it contained neither streets nor storm or sanitary sewers; was 3 miles from the nearest public elementary school and 4 miles from the nearest subway; its low elevation caused serious flooding during storms;

winds exceeding 15 miles per hour occurred about 30% of the time and tide action, currents and storms rendered the westerly part of Breezy Point, i.e., the "Tip" area, one of the most exposed areas in the metropolitan region (A9a-10a; F501-2, F2783-5; F514-516; 796-7).*

The property had been placed on the market in 1958 (A8a-9a, A17a; F.490-3, F.498). The seller, who "had developed and controlled not only Rockaway Point and Breezy Point but had also developed Atlantic Beach" (F. 2790; F.5014;838), advised the buyer that the owners of the

*The City has requested that the record on the last appeal to the Court of Appeals be certified to this Court. References to pages of the first trial transcript made part of that record by stipulation (vols. I, II, III-gray covered) are preceded herein by the letter F; and references to the transcript of the retrial (vols. IV, V, VI, VII-blue covered) are by page number alone.

cottages would resist ouster and consequent loss of investment in their summer homes (F.585-7, F.495-6). The purchasers promptly announced, many months prior to the closing, that they planned to build the nation's largest privately financed apartment house community at Breezy Point, a "city within a city," and made it plain that the tenants' 10-year ground leases would not be renewed (F.521-522). The tenants, "apprehensive of losing our homes," thereupon formed the Breezy Point Cooperative, and after several months of negotiations agreed to pay $12 million for the 415 acres of Breezy Point upon which their colonies were located (F.521-6, F.545). Petitioner's cost of the remaining land (368 acres) - consisting of 209 acres at the Tip in the westerly end of the peninsula improved with a beach club;

143 acres similarly improved with a beach club, located one mile east thereof and abutting the co-op's central tract; plus a 16-acre strip providing a right-of-way across the co-op's land to the otherwise landlocked Tip - was thus $5.5 million (A9a; A55a).*

(1)

Several months after the closing in January of 1961, a firm of consulting engineers recommended a development plan for the smaller tract, projecting thereon 6,900 apartments to house approximately 25,000 persons on 210 acres, after 65 acres of city-owned submerged land in Jamaica Bay

*Petitioner allocated $1.1 million from its $5.5 million purchase price to the improvements (beach clubs) on its books, and $4.4 million to the land-equivalent to $12,000 per acre for the 368 acres thus acquired (F.800-802). The beach clubs were subsequently rebuilt and the $4 million awarded for improvements at the first trial was accepted by the parties (F.373-4, F.470; A.17a, A.63a).

were acquired from the City and filled in (A13a; A53a). The residential community thus projected was to be provided with streets, storm and sanitary sewers, 4 public schools, 6 churches, police and fire stations, 3 shopping centers, libraries, etc.; it required remapping and rezoning of the land; an extensive fill operation to elevate the land by at least five feet; would take seven years to complete at a cost "in the order of $150,000,000 to $200,000,000"; and an over-all developer's agreement with the City was required on remapping, rezoning, public schools, police and fire protection, acquisition of the city's land, etc. (F.102, F.137, F.185, F.271; A12a-13a;

A53a).*

In February of 1962, petitioner received final rejection from the FHA for mortgage insurance on four apartment houses which it proposed to erect (F.784-792, F.2861-5). The FHA stated that the proposed development was "not economically feasible"; the land was in a remote area "relative to transportation and employment," and "during periods of storms, tides and hurricanes, is constantly flooded"; that accessibility "during storm periods is hazardous in the interests of tenant and public safety"; and the "cost to bring sewers, water and complete fill and street improvements to the project"

*The City's new Zoning Resolution, effective Dec. 15, 1961, had rezoned Breezy Point from 1-D, permitting a density of 225 apartments per net acre, to R4, permitting 39 apartments per net acre (F.109, F.2724-6;927).

would be excessive" (A.10a).

In March of 1962, a bill authorizing alienation of the City's land in Jamaica Bay was introduced in the Legislature, but failed of enactment and was never again introduced (A.13a; F.435-6, F.1208-9, F.2707-8). In June of 1962, petitioner filed a site plan with the City Planning Commission in support of its rezoning and remapping applications, projecting 55 apartment houses containing 6,900 apartments on the smaller tract, inclusive of the City's land (F.866-7). Opposition of various conservationist groups led to the Planning Commission's adjournment of its hearings on said applications in August and September of 1962; the "overall developer's agreement" sought by petitioner on public schools, police and fire protection, rezoning, etc.

was never completed or approved by the Board of Estimate; and in November of 1962, the Mayor appointed a committee to report on the advisability of converting Breezy Point into a park (F.147-8, F.2731-3; F.140; F.140; F.100, F.2403, F.2696-7, F.2692, F.2731).

Thereafter, in December of 1962 and January of 1963, petitioner commenced construction of 8 apartment houses and a shopping center on 5% of the land under review, i.e., a 21-acre site in its smaller tract, without any agreement on public schools, police or fire protection therefor, etc. (F.447, F.452). The City condemned the remaining 122 acres in petitioner's smaller tract in November of 1963, and the 209-acre Tip area in August of 1964. Petitioner abandoned any attempt to complete the 8 apartment houses on the

21-acre site, facing a shortage of $6.5 million in its financing thereof, and 4 years later, in October of 1967, the City agreed to purchase that site by repaying petitioner $5.6 million expended on construction and to buy the land at the unit price fixed by the award herein (A.53a; A13a; F.2560-4, F.2621-4). Apart from a remodelled beach club on the 209-acre Tip, and a second beach club on the 122 acre tract, the property condemned by the City, as the Court of Appeals pointed out, was vacant-"the same land in the substantially same condition of improvement" as when acquired by petitioner 3 years prior to condemnation (A.52a; F.476, F.480).

(2)

Although it had paid $5.5 million for the subject property 3 years prior to condemnation, petitioner claimed $70 million

therefor at the first trial, exclusive of the 21-acre site not taken. In support of that appraisal, its expert Wittman valued rental income from a completed apartment house community hypothetically erected on the smaller tract by capitalizing his income projections therefrom; relied upon land values shown by 51 sales of apartment house sites in fully devloped and long established residential centers; and then transferred to the 209-acre Tip area the values thus derived for the smaller tract (A.52a-56a). On the basis of that proof, $40 million was awarded (A.63a).

The Court of Appeals rejected the award because it was based on speculative proof violative of settled rules of valuation, stating that "neither theory as developed on the trial will support the award" (A.53a). As to valuing non-existent

income from a non-existent residential community containing dozens of hi-rise buildings on the vacant land under review the court pointed out that "no part of the work had been contracted for or started. The proposed development of the 'tip' was a plan without detail and this part of the property, low-lying and exposed to strong tidal and wind action would have required extensive fill to be usable for any residential development"; that "[e]laborate forecasts of income from non-existent structures on land which needed large physical change to be usable for the purpose is not a proper measure of fair market value"; and that the instant case was "indistinguishable" from many others where it had similarly rejected valuations of non-existent income from projected improvements "not yet

financed, on which no work had even been begun on the day of taking" (A.53a, A.54a).

As to the sales proof relied on as a basis for award, the Court of Appeals pointed out that awards must be based on sales of land "similar" to the property being valued (A.56a). The subject property "was not only vastly larger than the land to which it was compared, and markedly different in adjacent development, but its physical location on the Rockaway peninsula differed radically," said the Court, i.e., it "was raw, vacant land in a remote, inaccessible, undeveloped area," whereas the sales relied on were of land "in long-established, densely populated residential centers" (A.54a, A.55a). Rejecting the proposition that a claimant may be thus permitted, on the strength of a paper community, to harvest values created in

established residential centers by heavy investment of private and public funds, the Court noted that, as Wittman had conceded, "the theory essentially depended on the projected completion of claimant's entire future plan at a cost for construction alone of $275 million and on comparison of this projection with the other sample properties" in already thriving communities (A.55a-56a). In remanding for further proceedings, the Court of Appeals stated that "the only directly comparable property suggested by the record was the sale of 415 acres of contiguous land" by petitioner to the Breezy Point Cooperative, and that said sale should be considered "as well as the price paid by claimant for the land itself" (A. 55a, A.56a).

In May of 1972, a second trial was conducted, the parties stipulating that major portions of the 1966 trial record be incorporated in the new record (8-15). With the exception of a 52-acre site in a residential community in the Birchwood section of Queens, the Trial Court found that petitioner's proof depended on sales of land "vastly smaller as compared with the land in issue," i.e., sites that ranged up to 6 acres in size (A.40a). Although repeatedly stating that all the sales "are not comparables in that they are not similar with emphasis on the word 'similar'" (2028; 2045; 2020-1, 2025-6, 2032-3), the Trial Court nevertheless justified reliance upon the Birchwood sale for an award of $31 million (A.40a-41a; A.26a). It stated that "when the

market value is too difficult to find, *** basic equitable principles of fairness" may be made the basis of award (A.51a). It said (A.47a): "Stated in capsule fashion, this is a case 'where there are no appropriate comparable sales, where the land is vacant and unproductive and there is no income to capitalize, where the actual purchase price and the assessed valuation may not furnish a true guide to value'" (A.47a).*

The Court of Appeals rejected the proposition that market value was too

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*Although petitioner bluntly acknowledged in its Appellate Division brief that the $31 million award was primarily based on the Birchwood sale, stating that "the Court based its value primarily on one sale that it, rightly enough, regarded as the 'closest comparable'" (Pet.'s App. Div. br., p. 5), it would now apparently have this Court believe that the Trial Court relied upon "two of claimant's proffered sales," namely, the 133-acre Twin Pines site, as well as Birchwood (Petition, pp. 11-12, 15).

difficult to find, pointing out that - "little, if any, weight was given the prior sales of the subject property," which that Court had previously held to be of probative worth; that "great emphasis was placed upon the Birchwood 'comparable,' which should not have been considered" in light of its prior ruling that high rental land values in established residential communities may not be transferred to raw land in a paper community on the basis of "similarity"; and agreed with the two dissenting Justices in the Appellate Division that equitable principles of fairness could not justify departure from sound valuation rules in order to afford petitioner a $22 million profit herein (A5a; A18a; A12a). Agreeing with those dissenting Justices

that "the proper test for vacant land, unexploited or only partially exploited, is that found in Mtr. of City of N.Y. (Chestnut Props. Co.) (39 AD 2d 573, affd. 34 NY 2d 800)," the Court remitted the case to the Appellate Division for "reappraisal in light of the dissenting opinion" (A5a-6a).*

*The cited case effectively holds that "where, as here, the planned development of land is interrupted by condemnation, the best criteria of market value is the price a purchaser would pay for the land in the state of exploitation to which it had progressed at the time of vesting of title in the condemnor" and such purchaser would be guided, particularly in the absence of comparable sales, by "the recent actual sale price of the subject property" plus recompense for the work done "in preparing it for its contemplated use" (39 AD 2d at 574). An apartment house under construction in the cited case had been accepted as the land's best use.

In reappraising the case "in light of the dissenting opinion in this court," the Appellate Division fixed the award at $15 million as recommended therein, stating that "we have arrived at the same result, and for the same reasons, expressed in that dissent" (A4a). Those reasons had been fully set forth by the dissenting Justices in a detailed analysis of the record proof of both trials, as follows:

It was thus pointed out that "the FHA considered even a small part of any such proposed development to be economically unfeasible" (A12a); petitioner's planned 55-apartment house community on the smaller tract required 7' of fill to bring the land

to grade, would take 7 years to complete at a cost of $150-$200 million, and twice that time and investment would be required to create a "full-grown community on both tracts" (A12a, A14a); in over a decade "not a single conventionally financed high-rise apartment house had been successfully completed anywhere on the Rockaway peninsula" (A12a); the "financing procurable was grossly inadequate" and petitioner "wholly inexperienced" with any such developments (A12a); its plan depended on acquiring and filling "a sizable tract of city-owned land in Jamaica Bay," which petitioner had failed to secure (A13a); the "remapping of streets, rezoning agreements with the city on public schools, police

and fire protection, etc., had already encountered substantial public opposition" (A13a); as to the buildings started on the 21-acre site not taken, mortgaging all of its land and assets had enabled petitioner to secure 50% of the construction costs requested of the FHA, leaving a $6.5 million deficiency therefor (A13a); "normal financing was not available for executing" its apartment house community concept "in this remote area" (A13a-14a); "claimant made no attempt to establish that the abandoned buildings would have proven profitable," whereas the City's experts had established the contrary, and - "their views, unlike that of the claimant are amply supported by the evidence" (A14a); a projected use not shown likely of achievement in

the reasonably near future "may not be the basis for a finding of value" (A14a); where a "proposed high risk development is to take place in a remote, inaccessible area and where there is a complete absence of credible proof that the venture is economically sound, we may not by any common-sense standard, assume its ultimate success. Indeed, every realistic sign points to its probable failure" (A.12a).

Although "the risks inherent in this venture are much greater" than those found in cases where a planned use of land in an early stage of development was accepted as a basis for award, it was concluded that the same rule should be applied here, namely, the award

should be based on "actual sale price plus recompense for developmental enchancement" (A16a-17a). Accrediting the valuation of City expert Tuchler, who had appraised the land at $11,819,000 in reliance "primarily on the two sales that offered the most comparability and that was the subject property and the other property contiguous" thereto sold to the Co-op (1747; 1751-2, 1757, 1760-1; 1631, 1659, 1804-6), an award not to exceed $15 million was held appropriate herein (A18a).

Thus, petitioner's actual purchase price, which included beach clubs previously compensated and the 21 acres not taken, was $5.5 million; it had expended $5.6 million on the abandoned buildings partially built

on said 21 acres, $3.4 million to rebuild the beach clubs, $640,000 in bonuses to get financing, and various sums for real estate taxes, architect and legal fees, etc. - for a total investment of $19.3 million (A17a; F799-804, F815, F849). Against that investment, it had already secured $10.7 million - $5.6 million for the abandoned structures purchased by the City, $1.1 million for the 21 acres thereunder, "$4 million for the beach clubs by virtue of the award made at the first trial" - leaving a balance of $8.6 million (A17a). Deducting therefrom $4,400,000, "the amount allocated by the claimant to its purchase price for the unimproved land" and to be separately compensated herein - "leaves a figure of $4,300,000 representing the costs of

developmental enhancement" (A17a).*

The Appellate Division awarded $15 million "for the same reasons" specified by the dissenting Justices and above set forth (A4a). The Court of Appeals, in affirming that award

*The City contended that of the $19.3 million in total expenditures, no prospective purchaser could reasonably be expected to view $640,000 in bonuses for financing; beach club losses in amount of $451,822; or $450,000 in real estate taxes as enhancing land value (F802, 812, 815, 849). Although the award for the land ($15 million), and the $10.7 million previously secured by petitioner, exceeded its total investment ($19.3 million) by $6.4 million, petitioner asserts that the award "represents a destruction of the investment in claimant's securities" (Pet., p. 16). The plain fact is that 91% of petitioner's common stock had been acquired by the "insiders," the holders of preferred shares, at 25-cents per share (City Ex. 26, pp. 4, 6, 8-9, 31-32). And any post-condemnation actions by petitioner that may have reduced funds available for distribution to holders of preferred stock cannot alter the fact that it has received $6.4 million above total investment.

stated that "the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis comparable to the condemned property" (A.1a).

ARGUMENT

AN ISSUE OF QUANTUM, RESOLVED ON CONFLICTING APPRAISAL EVIDENCE ADDUCED AT TWO TRIALS, PRESENTS NO SUBSTANTIAL FEDERAL QUESTION. THERE IS NO FUNDAMENTAL RIGHT TO AN AWARD BASED ON SPECULATIVE PROOF OF VALUE.

This Court has repeatedly held that it will not grant a writ of certiorari "merely to review the evidence or inferences drawn from it." General Pictures Co. v. Electric Co., 304 U.S. 175, 178 (1938); see United States v. Johnston, 268 U.S. 220, 227 (1924). In summarizing the cases dealing with review of condemnation awards made

by State courts, the controlling rule was thus set forth- "when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence." Roberts v. New York City, 295 U.S. 264, 277-8 (1935); see also, Bailey v. Anderson, 326 U.S. 203, 205 (1946); Appleby v. Buffalo, 221 U.S. 524, 531-2 (1911); Stern & Gressman, Supreme Court Practice (3d ed., 1962), p. 142. "A claimed inadequacy of the awards however, does not raise a constitutional question." 3 Nichols, Law of Eminent Domain (revised 3d ed., 1973), p. 11; 1 Nichols, op. cit., p. 4-229.

In the only case cited by petitioner to justify the writ sought herein, this Court stated that: "Our concern is not

to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right." McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 363 (1918) [Pet., pp. 19-20]. After two trials, at which it was afforded every opportunity to introduce valuation evidence of probative worth to support its exorbitant claimed valued, petitioner's inability to do so can scarely be deemed a denial of due process.

(1)

Although the $15 million award for the subject vacant land was based on the City's appraised value of $11,819,000--which, in turn was several times petitioner's own

purchase price 3 years prior to condemnation (ante, pp.6,24-26)--petitioner urges that the writ should issue because an "award based on the owner's costs rather than on market value" may be "seized upon by condemning authorities across the land as a license" to deny just compensation, and "become a pattern for subverting constitutional guarantees" (Pet., pp. 16, 18-19).

As this Court long ago observed of market value-"Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons." United States v. Miller, 317 U.S. 369, 374-5 (1943). That such guesswork is largely eliminated by a recent sale of the subject property and of a tract contiguous thereto, as here,

is uniformly recognized. In fact, only in the absence of a recent sale of the subject property are sales of other parcels considered the best evidence. "This court is definitely committed to the proposition, which so far as we know is generally accepted, that, in the absence of recent voluntary sales of the condemned land itself, usually the best evidence of value available is the prices at which comparable lands in the vicinity of the land condemned" were sold. Bailey v. United States, 325 F. 2d 571, 572 (1st Cir., 1963). Thus, a sale of the subject property is uniformly recognized as "evidence of the very highest rank to determine the true value of the property as of that time." Matter of Woolworth Co. v. Tax Comm., 20 NY 2d 561, 565 (1967), 232 N. E. 2d 638; United States v.

Certain Land in Borough of Brooklyn, Etc., 346 F. 2d 690, 693 (2d Cir., 1965). In short, the cost of land, as shown by a recent sale thereof, is uniformly regarded as probative evidence of its value, and to award several times that amount, as here, can scarcely be deemed a denial of due process.

(2)

Petitioner contends next that it was denied its fundamental right to a fair trial because "for the first time that we know of in a condemnation proceeding, all market data has been excluded from consideration" (Pet., p. 16). As stated by the Court of Appeals (A.1a)--"The simple answer is that the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis

comparable to the condemned property."

On the first trial, petitioner relied on sales of land in long-established and heavily populated residential communities to value acreage in a paper community located in a remote and inaccessible area (ante, pp. 11-13). It is uniformly held that land in a developed area is not similar to acreage in an undeveloped area. County Board of School Trustees v. Batchelder, 7 Ill. 2d 170 (1955), 130 N.E. 2d 175, 179; Waukegan Park Dist. v. First Nat. Bank of Lake For., 174 N.E. 2d 824, 827 (S. Ct., Ill., 1961); State v. Gorga, 54 N.J. Super. 520 (1959), 149 A. 2d 266, 268-9; Southern Elec. Generating Co. v. Leibacher, 110 So. 2d 308, 315 (S. Ct., Ala., 1959); Commonwealth v. Bond, 391 S.W. 2d 692, 693 (C.A., Ky., 1965); Cravens v. Amarillo, 309 S.W. 2d 903 (Tex. Civ. App., 1958), cert. den.

358 U.S. 882 (1958); Miss. State Hwy. Comm. v. Hall, 174 So. 2d 488, 494 (1965); Memphis Housing Auth. v. Mid-South Title Co., 443 S. W. 2d 492 (Ct. App., Tenn., 1968); Arkansas State Hwy. Comm. v. Welter, 444 S.W. 2d 65, 67 (S. Ct., Ark., 1969); Triple Cities Shopping Ctr., Inc. v. State of N.Y., 26 AD 2d 744, 745 (3rd Dept., 1966), affd. 22 NY 2d 683 (1968); Vasile v. State of N.Y., 30 AD 2d 1042, 1043 (4th Dept., 1968), affd. 24 NY 2d 969 (1969); United States v. Certain Land in Squares 532 and 570, 473 F.2d 94, 95 (D.C. Cir., 1972).

On the second trial, the trial court found that "'there are no appropriate comparable sales'" (ante, p. 17). That court's reliance upon a sale of land in an established residential community in Birchwood, while conceding its dissmilarity to the

subject property, was again rejected by the Court of Appeals (ante, pp. 16-19). Neither the absence of comparable sales, nor petitioner's failure to establish that any such sales were of greater probative worth than the two Breezy Point sales actually relied on in fixing the award, denotes a denial of due process.* At best, it would amount to that "dubious mistake in the appraisal of the evidence" which

*Affirmed awards will not be sustained by the New York Court of Appeals where not supported by substantial and legally competent evidence or where based upon any erroneous rule. St. Agnes Cemetery v. State of N.Y., 3 NY 2d 37, 40 (1957), 143 N.E. 2d 377; Mtr. of City of N.Y. (Fifth Ave. Coach Lines), 22 NY 2d 613, 620-1 (1968), 241 N.E. 2d 717; Mtr. of City of N.Y. (Coogan), 20 NY 2d 618, 623 (1967), 233 N.E. 2d 113; Arlen of Nanuet v. State of N.Y., 26 NY 2d 346, 352-3 (1970), 258 N.E. 2d 890; City of N.Y. (Shorefront H.S.-Rudnick), 25 NY 2d 146, 148-150 (1969), 29 NY 2d 869, 870 (1971); Latham Holding Co. v. State of N.Y., 16 NY 2d 41, 44 (1965), 209 N.E. 2d 542.

this Court has repeatedly held to afford no basis for granting a writ of certiorari. Roberts v. New York City, 295 U.S. 264, 277-8 (1935), and cases cited ante, pp. 27-29.

(3)

Petitioner baselessly contends that "all evidence of the income to be expected" from its planned apartment house communities was excluded from consideration, as was "the standard method of valuation by capitalization of expected income" (Pet., pp. 16, 19). As previously shown, at the first trial petitioner valued its income projections on the assumption that it had already borne all of the risk of successfully financing, building and renting two apartment house communities estimated to cost between $300-$400 million dollars--so that a purchaser of raw acreage in a

remote and inaccessible area, having nothing more to do but collect rent, would pay a price based upon the value of a non-existent stream of rental income (ante, pp. 11-15). The fallacies underlying the concept that an award for vacant land may be based upon the value of non-existent income from a non-existent development thereof have been repeatedly exposed. U.S. ex rel. T.V.A. v. Powelson, 319 U.S. 266, 281, 285 (1943); Tallman v. M.E.R.R. Co., 121 N.Y. 119, 125 (1890); Arlen of Nanuet v. State of N.Y., 26 NY 2d 346, 352-3 (1970), 258 N.E. 2d 890; Levin v. State of N.Y., 13 NY 2d 87, 90-91 (1963), 192 N.E. 2d 155; Levitin v. State of N.Y., 12 AD 2d 6, 7 (3rd Dept., 1960); Vasile v. State, 30 AD 2d 1042 (4th Dept., 1968), affd. 24 NY 2d 969 (1969); Dist. of Col. v. Lot 813 in Square 568, 232 F. Supp. 714, 718-719 (D.C.

Cir., 1965).

Petitioner asserts that in United States v. 25,406 Acres of Land, etc., 172 F. 2d 990, 993 (4th Cir., 1949), cert. den. 337 U.S. 931 (1949), it was held "appropriate to use the capitalization of estimated future income in valuing the property" (Pet., p. 28). It was there expressly stated, however, that such valuation of a non-existent income stream from a non-existent development "was admitted, not as evidence of value (and this was carefully explained in the charge to the jury, where market value was correctly defined)," but because an expert may always explain the basis for his opinion regardless of how conjectural it may be (172 F. 2d at 993). In short, it was there admitted as "merely evidence of highest and best use" and not as a basis for valuing vacant land

as though it had already been developed for such use--as is pointed out in Dicker v. United States, 352 F. 2d 455, 458 (D.C. Cir., 1965).*

Although such non-existent income may not be valued as a basis of award for vacant land, it is settled law that evidence of income and construction costs may

*Although, on petition for a writ of certiorari, "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority" (McCoy v. Union Elevated R. R. Co., 247 U.S. 354, 363 [1918], the New York rule plainly reflects this Court's view that "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value-a thing to be condemned in business transactions as well as in judicial ascertainment of truth." Olson v. United States, 292 U.S. 246 257 (1934).

properly be considered to establish a projected best use as one likely of achievement in the reasonably near future. Mtr. of City of N.Y. (Broadway Cary Corp.), 34 NY 2d 535, 536 (1974), 309 N.E. 2d 870; City of N.Y. (Shorefront H.S.-Rudnick), 25 NY 2d 146, 149 (1969), 250 N.E. 2d 333; Humbert v. State, 278 App. Div. 1041 (4th Dept., 1951), affd. 303 N.Y. 929 (1952); Dicker v. United States, 352 F. 2d 455, 458 (D.C. Cir., 1965). On the second trial, however, petitioner introduced no such proof (ante, p. 22). It relied, instead, on the progress achieved with respect to the abandoned buildings, but failed to show the economic feasibility thereof so as to provide some basis for assuming a similar development on the 95% of its land under review would have been equally

"successful" (ante, p. 22). In contrast, the F.H.A. had "considered even a small part of any such proposed development to be economically unfeasible," and the views of the city's experts to the same effect, "unlike that of the claimant, are amply supported by the evidence" (A.12a, A.14a; ante, pp. 20-23).

(4)

Finally, petitioner urges that "ruling out of consideration *** all the factors that a prospective purchaser" would consider, effectively deprived it of a fair trial (Pet., p. 19). All of the factors that a prospective purchaser would consider were thoroughly detailed by the New York courts on the basis of the record proof. Petitioner's purchase of the property, its planned development, the physical location and condition of the property, the

unavailability of financing for a $300-$400 million apartment house community in a remote and inaccessible area, the F.H.A.'s rejection of insured financing because of economic unfeasibility, the myriad problems already encountered--would have led any prospective purchaser to the conclusion of the New York courts that "every realistic sign points to its probable failure" (ante, pp. 20-25 ; A.12a).

Nevertheless, the measure of damages adopted by the New York courts compensated petitioner for its planned use of the land as the best use thereof. The Court of Appeals ruled that "the proper test for vacant land, unexploited or only partially exploited, is that found in Mtr. of City of N.Y. (Chestnut Props. Co.) (39 AD 2d 573, affd. 34 NY 2d 800)" [A.5a-6a]-where an on-going apartment house development was

held to be the land's best use (ante, pp. 18-19). In consequence thereof, petitioner was awarded several times its recent purchase price for the subject property, plus developmental costs that a purchaser undertaking to complete 95% of the planned community would have assumed (ante, pp. 24-26). See Dist. of Columbia v. Lot 13 in Square 568, 232 F. Supp. 714, 715-717 (D.C. Dist., 1964), affd. 346 F. 2d 833 (D.C. Cir., 1965); Orleans Parish School v. Montegut, Inc., 255 So. 2d 613, 617 (4th Cir. Ct. App., La. 1971); Rustcon Developers, Inc. v. State of N.Y., 33 AD 2d 582 (3rd Dept., 1969); Matter of County of Westchester, 204 Misc. 1037, 1038-9 (1953), affd. 285 App. Div. 1169 (2nd Dept., 1955); Salamone & Co. v. State, 40 AD 2d 916 (3rd Dept., 1972).

Petitioner's exhortation that the award herein may set "a pattern for subverting constitutional guarantees" (Pet., p. 19), is thus seen to be vacuous and incapable of creating a substantial federal question where none in fact exists.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: September 30, 1976.

Respectfully submitted,

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Supreme Court, U. S.
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OCT 15 1976
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

REPLY BRIEF FOR PETITIONER

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The City brief in opposition to certiorari undertakes no contest on the constitutional principles involved, and strives instead to present the case as involving only the resolution of "conflicting appraisal evidence" as to "quantum."

Nothing could be further from the truth. There was not a single disputed fact involved in the determination of the Court of Appeals and none is involved here. Nor did the appraisals of either side enter into the determination.* The determination was simply a *rule of law*—that valuation should be made solely on an adding machine basis of

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* The resolution of conflicting appraisals was made in the trial court and Appellate Division, where jurisdiction to review the facts ended, with awards $25,000,000 and $16,000,000 greater than the award made by the Court of Appeals.

totaling land and improvement costs, with nothing else to be given any consideration whatever.*

We believe, therefore, that this reply brief can serve most usefully by pointing up the City's default on every

* Therefore no correction of the City's factual statements is undertaken beyond this footnote limited to giving samples of how badly misstated or distorted the City's presentation is.

The City treats with claimant's agreed upon acquisition of some additional underwater land from the City by stating that a bill authorizing this sale "was introduced in the Legislature but failed of enactment and was never again introduced" (City Br. 9). The facts are that the City wanted to sell the land for incorporation into claimant's development and agreed to do so with unanimous approval of the City Council, but the bill for necessary state authorization, unanimously approved by the State Senate, reached the State Assembly too late for consideration that year. The bill was not reintroduced the next year because condemnation was in the offing, but every City witness concerned with the subject and the Speaker of the Assembly testified that the sale would have been completed as a matter of course if there had been no condemnation. The suggestion that claimant's plans "depended" on the acquisition of this underwater land (City Br. 21) is absurd, with claimant owning 122 acres of upland and 55 acres of underwater land in the initial area of development alone.

Similar references to rezoning, remapping, and the overall developer's agreement not being finalized (City Br. 9-10) omit that all were agreed upon and that the City witnesses again conceded that all formal approvals would have been obtained were it not for the condemnation. Indeed, the only "opposition" to claimant's development was from those who wanted to turn Breezy Point's matchless attributes to public use.

The City speaks of supposed "unavailability of financing" for the development (City Br. 43), stating that claimant faced "a shortage of $6.5 million in its financing of the project" and suggesting that development plans were consequently abandoned (City Br. 10-11). As the City well knows, there was no shortage in financing and it is using a false set of figures excluded from evidence; every step in the development had been fully financed by leading financial institutions, and all funds necessary to carry the development through to completion were readily available from like sources, including two of the principal investors in the development, Allstate Insurance Company and Continental Assurance Company. The development plan was not abandoned; it was ended and destroyed by condemnation.

And the City speaks of development "problems" with low-lying land and the need for extensive fill, without telling that elevations to protect the property completely had been agreed upon with the City and the exact amount of the fill needed and the cost were known and provided for.

aspect of the law in which the decision of the Court of Appeals manifested its unconstitutionality.

I.

There is no question that the *rule of law* laid down for this case, and for any following case involving unique property, is that a condemnation award for such property is to be based upon "actual sale price," on acquisition of the property by the condemnee, "plus recompense for developmental enhancement," which "enhancement" is, in turn, to be measured by "the *costs* of developmental enhancement" (City Br. 23-26).

This determinative holding was not premised on any factual finding that cost figures represented fair market value—a subject altogether eschewed by the court. On the contrary, there were affirmed and conclusive findings of fact—with respect to the two transactions that the Court of Appeals said in its first opinion should be given "some consideration" (56a), but which finally became the sole consideration in determining the "sale price" that was to be used as land acquisition cost—that (1) claimant's original contract to purchase Breezy Point was "something less than a normal market sale" that "does not reflect the true or actual value of the property" (45a-46a), and (2) the assignment by claimant to the Breezy Point Cooperative of the right to purchase a portion of the property was "indeed a forced sale" in which "claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms" (45a).*

The Court of Appeals' rule that, *irrespective of the facts,* the award was to be based on costs, cannot stand

* References are to Appendix to Petition for Writ of Certiorari.

against this Court's uniform holdings that "it is the property and not the cost of it that is safeguarded by state and federal constitutions" (*Olson* v. *United States,* 292 U.S. 246, 255 (1934)); that original cost is "the false standard of the past" (*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396, 403 (1949)); and that "the general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price" (*United States* v. *Commodities Corp.,* 339 U.S. 121, 130 (1950)).*

Clearly constitutional law is, and could not be otherwise, that a landowner is entitled to receive on condemnation the fair market value of his property at the time of taking and in its then state of exploitation—not a return of costs. The rule laid down by the New York court is plainly unconstitutional, and undermining of the entire law of condemnation as far as unusual properties are concerned.

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* In apparent pursuit of its unfounded theory that the award represented a resolution of "conflicting appraisal evidence," the City comes up with the assertion, false on its face, that the $15,000,000 award was based on the City's appraised value of $11,819,000 (which took no account of developmental enhancement), which it falsely says was several times petitioner's purchase price (City Br. 29-30). The City seems to forget that in its last presentation to the Court of Appeals it said "the award was based" on the "price paid by the Co-op," and that in the immediately preceding tortured figuring in its brief (City Br. 25-26), like the unfathomable figuring in the Appellate Division's dissent (17a), it arrives at $4,300,000 as "the costs of developmental enhancement," leaving only $10,700,000 for the land itself, "based," as the dissent in the Appellate Division said, upon the "actual sales price" on acquisition (17a).

As pointed out in the petition (fn. p. 15) the $10,700,000 figure does jibe with the price paid by the Cooperative, without any allowance for normal land appreciation or inflation over the three years preceding condemnation, which a City appraiser said would be 5% a year for land with no development going on, and which claimant's appraiser said would be 10%. The figure also jibes with the purchase price under claimant's contract of purchase with a midway inflation factor.

As to how claimant has made out on this costs based award: with having to pay over $7,000,000 in interest alone on pre-condemnation construction and development loans at rates far in excess of the rate paid by the City under its special exemption from paying market rates on a condemnation award, and pay for economic and market studies, expert services, legal fees, trial minutes, printing of records and briefs and myriad other expenses of preparation and conduct of two trials and six appeals over thirteen years, the result, as noted in the petition (p. 16), is that the award made has completely wiped out claimant's common stock, that had a market value just before the first rumors of condemnation of over $25,000,000, and its junior preferred stock, representing a 1961 cash investment of $5,000,000, plus loss of accrued interest of over $5,000,000.

II.

There is no question that the New York court has laid down a rule of law that excludes from consideration all market data—the essential basis of a constitutionally required market valuation—resulting in a valuation and award far below the minimum value of land available for apartment house use in the City of New York as established by sales of vastly inferior properties.

Thus excluded were all sales of properties offered as comparables by either side, including properties offered by both sides. The experts for both sides at both trials, in accordance with standard and universally accepted valuation methodology, used sales and a large number of them. But the Court of Appeals would have none of them. This exclusion of sales, coming on top of the exclusion of the other standard and accepted method of valuation by capitalization of expected income, made a determination of value and just compensation impossible. That is unconstitutionality (*McCoy* v. *Union Elevated R. R. Co.,* 247 U.S. 354 (1918)).

The City would have it that this blanket exclusion of sales was but a discriminating consideration of similarity. The pretense is empty. Not a word was addressed to any of the individual sales placed in evidence in the second trial, except for Birchwood, in either of the Court of Appeals' second and third opinions, and the dissent in the Appellate Division simply took the words of the trial court that the sales were not "truly comparable"—ignoring the sense in which the words were used, as the trial court explained, that the sales did not "measure up in value to Breezy Point" (29a) and could not be "adjusted with any degree of mathematical precision" to Breezy Point (48a)—as disposing of them. Also ignored was the fact that the trial court could and did find, as anyone could in any market, that sales of patently inferior properties give at least "a vestige of value" as related to a superior property, as the trial court found was the case in relating the sales properties to Breezy Point (43a-44a).

The irony and injustice lie in the fact that the condemned property was made the victim of arbitrary rule and the exclusion of all precepts and standards of valuation because of its virtues—because it was "a precious asset incapable of duplication" (the Mayor's words in recommending condemnation), because it was "the last remaining oceanfront in New York and one of the world's great beaches" (words of the City Planning Commission in deciding to condemn), because it was unique and nothing could be cited for comparison that could "measure up in value." Could there be less of an excuse for throwing away the book of valuation and all condemnation principles and practice, for abandoning the rational altogether and ending up with a valuation far below the market for far inferior properties?

The only proper and constitutional response to the uniqueness of Breezy Point as a condemnation problem is that dictated by this Court in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949), that even "scattered sales" of other properties "bearing on what a prospective purchaser would have paid" must be considered. The trial court and Appellate Division complied; the Court of Appeals dismissed all sales from consideration. What this augurs for the future in the valuation in condemnation of the most valuable properties is too clear for comment, unless this Court applies constitutional correction. Just as the answer given to the old observation that the power to tax is the power to destroy was "Not so long as this Court sits," the answer should be the same to threatened destruction by exercise of the power to condemn, such as the Court of Appeals has wrought by its rule of law in this case, destroying the landowner's property interests without constitutionally mandated compensation.

III.

There is no question that the New York court has laid down a rule of law flatly prohibiting the use of the capitalization of estimated future income method of valuing property in cases of land under development.

Whatever may be said about the use of capitalization in cases where development has only been planned and no construction has taken place—like *United States* v. *25.406 Acres of Land*, 172 F.2d 990 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949), and *United States* v. *Waterhouse*, 132 F.2d 699 (9th Cir. 1943), *aff'd mem.*, 321 U.S. 743 (1944), in which the use of capitalization evidence was given reasoned sanction

(Petition, 28-30)*—there should be no question that when a development has gone as far as the development here, with eight buildings advanced in construction and ready for rental, and a shopping center virtually completed and fully rented, the use of capitalization should be allowed.**

All the experts on both sides at both trials agreed that a prospective purchaser—whose valuation processes constitute the standard by which courts are required to make condemnation valuations, as this Court has repeatedly

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* The City seems to suggest (City Br. 37), that this Court ruled out capitalization in a case of a "non-existent development" in *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266 (1943), but the Court there expressly stated that it did not reach this question, which it described as being "much discussed at the bar and in the briefs" (319 U.S. at 285).

The City makes the captious point that the capitalization evidence in *25.406 Acres of Land* was admitted not as direct evidence of value but as matter considered by an expert witness in arriving at his estimate of value (City Br. 38). That is the only way that capitalization evidence, and sales evidence as well, comes into any case, just as it was in this case. And contrary to the City's depiction of *25.406 Acres of Land* as admitting capitalization evidence merely as evidence of highest and best use (City Br. 38), the court made it clear that "in estimating the value of the property" for its best use, "i.e., what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed" (172 F.2d at 993).

**Perversely, having succeeded in getting the use of capitalization excluded in the valuation process, the City takes claimant to task for not having introduced capitalization evidence at the second trial on the subject of best use (City Br. 22, 40). Such evidence in abundance was adduced at the first trial and stricken from consideration altogether. When the parties stipulated the evidence from the first trial that was to be received at the second, all capitalization evidence was omitted by common consent that it was not admissible for any purpose. It remains only to add that, as in *25.406 Acres of Land,* there is no support for the City's contention that such evidence might be used to establish best use but not to establish value.

stated (Petition, 22-24)—would have employed capitalization in this case.*

As the basis for its exclusion of capitalization methodology, the Court of Appeals hypothesized, so contrary to fact, that "no part of the work had been contracted for or started" on claimant's development. The City can only continue the pretense that this case is concerned only with a "non-existent development" as the basis of its defense of the Court of Appeals' ruling (City Br. 37).

When, however, the Court of Appeals was taxed on the second appeal to that Court with the untenability of the predicate of its decision with respect to capitalization, the court went further in its rule of exclusion and dictation of valuation based on costs by stating that an award based on costs is proper when the condemned property is "unexploited or only partially exploited" (5a-6a). Thus the rule of law enunciated is that unless a property is fully exploited the prime method for valuing property under development that would be used in the market place and by any prospective purchaser may not be employed in New York state. This is a rule of law, we respectfully submit, that cannot pass federal constitutional muster, particularly when, as here, it is combined with the exclusion of sales and every other consideration that is requisite to a fair market valuation.

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* It is not true that claimant's capitalization evidence at the first trial proceeded, as the City says in its diversion, "on the assumption that it had already borne all of the risk of successfully financing, building and renting its apartment house communities" (City Br. 36). The valuations by capitalization included substantial discounts for risk and profit factors. The issue, however, is not whether the capitalization evidence had flaws or whether a different valuation might be made by capitalization by another expert. The issue is whether capitalization evidence is admissible at all in valuation of a property advanced in development.

IV.

There is no question that the rule of law enunciated by the New York court of valuation on a costs basis gives no consideration to and takes no account of best use and is thus in direct conflict with the principle, often reiterated by this Court, that property must be valued on the basis of the highest and best use to which it could be put at the time of condemnation, regardless of how it was used before (Petition, 30).

While the City badly asserts that "the New York courts compensated petitioner for its planned use of the land as the best use thereof" (City Br. 42), there is not and could not be any reference in the brief to indicate that the Court of Appeals paid any attention to best use, for, as was pointed out in the petition, the court made no mention of best use in any of its three opinions, although that was a featured subject in all briefs of both sides on each occasion the case was before the court. It may be gleaned from the City's following citation of the *Chestnut* case (39 App. Div. 2d 573), which the Court of Appeals held in our case stated the proper rule for valuing "unexploited or only partially exploited" property on the basis of costs, that the City is simply taking its reference to that case, as involving "an on-going apartment house development [that] was held to be the land's best use," as signifying that the court made the same determination here. Not only is there no support for the insinuation, it is clear that the Court of Appeals made no such determination in this case because it set itself against recognizing any "on-going apartment house development" or that any development had taken place at all.

Further, it is absolutely clear that the award in this case was not made, as was required, on the basis of an apartment house use—conclusively determined to be the best use by the Appellate Division's affirmance of that determination by the

trial court—but was based on a bungalow use, as that was the only use of the property when claimant acquired it. Likewise, as a City appraiser conceded, the purchase by the Cooperative was not for the property's best use, but was specifically for continuing a bungalow use. Valuation, based as it was only on acquisition costs in those transactions, represented a valuation only for bungalow use, not the use to which the property was dedicated and so far advanced at the time of condemnation three and a half years later. The rule of law adopted by the Court of Appeals is thus shown again to be in violation of constitutional commands.

V.

There is no question that in all—mandating a valuation based solely on costs and ruling out of consideration all market data and the standard methods of valuing property—the New York court has violated the cardinal constitutional principle, repeatedly expressed by this Court (Petition, 22-25), that all facts and factors that a prospective purchaser of the property would consider must similarly be considered by a condemnation court in determining value.

In all of this there is no factual "issue of quantum" or any other factual issue or matter of resolving "conflicting appraisal evidence." It is a matter entirely of governing law in conformity with constitutional requirements, as to which there was no difference among appraisers.

The *City* experts all conceded that determination of best use was the first essential to valuation, that any prospective purchaser of the property would employ capitalization, as well as sales, in reaching his determination

of value and what he would pay for the property; all purported to reach their valuations on the basis of sales and acknowledged that they were prevented from using what they considered to be the most pertinent sales, in the area adjacent to Breezy Point, by the court's ruling. As all sales, as well as capitalization, best use and all market data went out with the Court of Appeals rule of law, all appraisals went for naught. Indeed, there was nothing to appraise. An adding machine was substituted for appraisers and its totalizing for appraisals and a decision.

There need never have been a trial for there was nothing to try in the eyes of the Court of Appeals. Nothing in either trial mattered. The one thing to be said for the decision, if it should be upheld, is its simplicity in saving trials whenever an extraordinary property is involved and development is interrupted by condemnation. But the constitutional guarantees of just compensation will have been written out of the Constitution. Only this Court stands in the way.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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